TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1174.

DICK DUNCAN, APPELLANT,

vs.

T. P. McCALL, SHERIFF OF BEXAR COUNTY, TEXAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED MAY 19, 1890.

claims taxed at a greater rate than the mining claims of other corporations in the Territory.

"3. It is not shown that any deductions were denied in taxing the bank shares that were allowed to other corporations in the Territory.

"4. It is not shown but what the taxation of bank shares is just equivalent to the taxation of other corporations whose entire capital stock is invested in assessable property in the Territory.

"5. It does not appear that money invested in bank shares is subjected to any higher or greater rate of taxation than any other monied capital invested in the Territory.

"6. On the contrary, it does appear that if the entire capital stock is assessable in the Territory the shares which represent such stock ought to be exempt, and that if the capital stock is exempt for any reason the shares, in order that there may be no discrimination in their favor, ought to be taxed.

"7. If money invested in a national banking association or other corporation is taxed at the same rates as other property, it is immaterial whether the tax is levied upon the shares which represent the capital stock or upon the capital stock itself. In either case the same result is arrived at and the money invested is subject to the same and equal taxation.

"8. The right to form banking associations being a privilege of great value, by means of which large profits are earned for the shareholder, this right or privilege is property, and the shares become subject to taxation though the capital stock is exempt, and so a banking association has the same relation to the statute of the Territory as would any other corporation whose capital stock was not invested in assessable property in the Territory, in which case the shares would be subject to taxation.

"The judgment is affirmed with costs.

"D. S. WADE,
"*Chief Justice.*
"J. H. McCLEARY,
"*Asso. Justice.*
"THOS. C. BACH,
"*Asso. Justice.*

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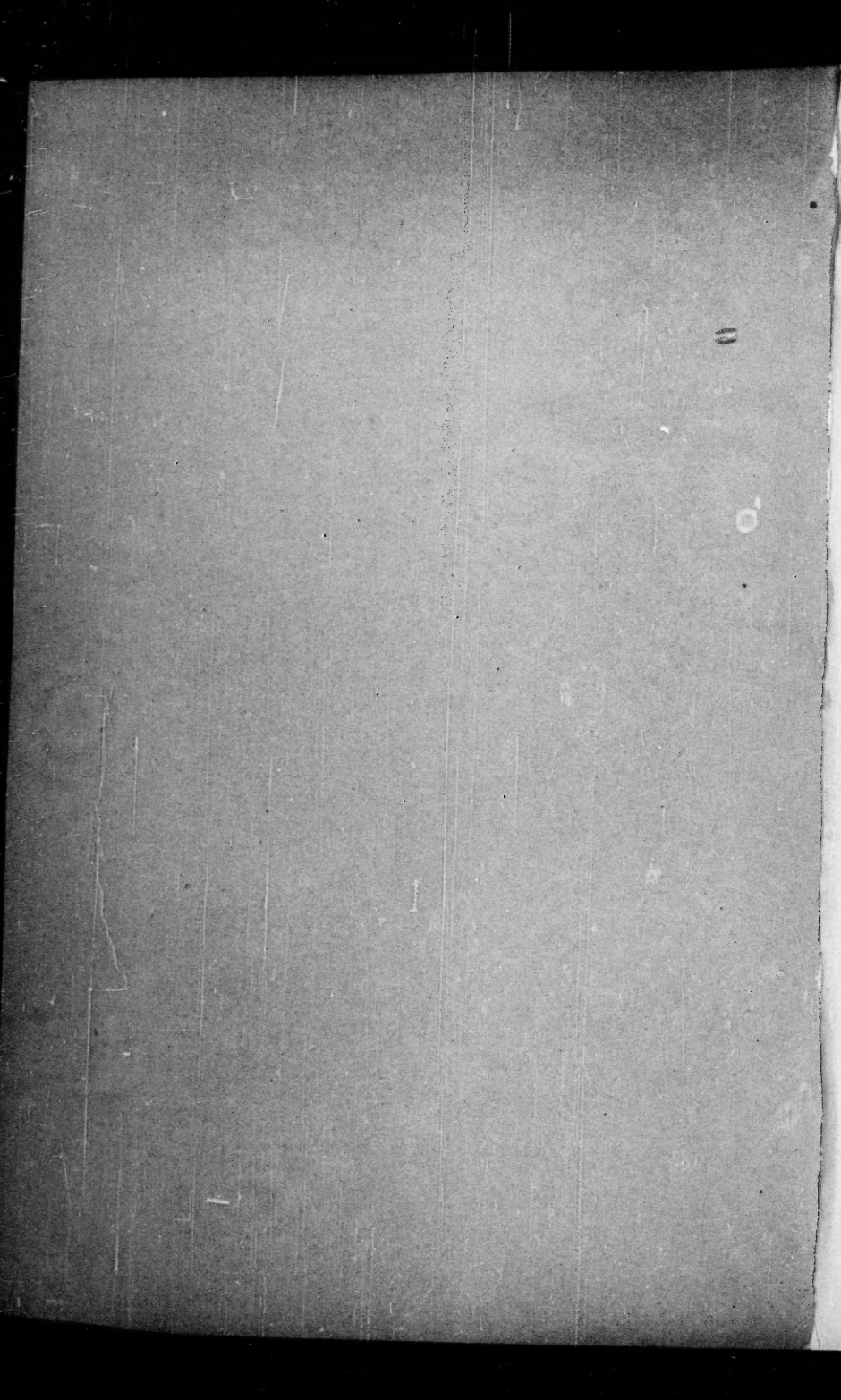

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1890.

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1 *Caption.*

Be it remembered that on the 15th day of May, A. D. 1890, in the United States circuit court for the western district of Texas, at San Antonio, Texas, the following proceedings were had in said court in the case of *Ex parte* Dick Duncan on application for writ of *habeas corpus*, to wit:

2 To the Hon. Don A. Pardee, United States circuit judge for the fifth judicial circuit:

Your petitioner, Dick Duncan, respectfully represents to the court that he is a citizen of the United States, and as such is entitled to the equal protection of the laws of the land; that he is unjustly and unlawfully detained and imprisoned in the jail of Bexar county, Texas, by T. P. McCall, sheriff of said county and State, by the supposed virtue of the following facts, to wit:

On the 23rd day of May, 1889, four certain alleged bills of indictment were alleged to be found and presented by twelve alleged grand jurors in and for the county of Maverick, in said State, in which your petitioner was falsely accused of the crime of murder and charged with killing Levonia Homes, Beulah Williamson, M. A. Williamson, and Ben. Williamson, as will also appear by reference to Exhibits A, B, C, & D, hereto attached and made part hereof. Writs of *capias* were issued thereon and your petitioner was arrested. See Exhibits E, F, G, & H; that later, on the 7th day of December, 1889, at a term of an alleged district court, in said Maverick county, an alleged trial transpired, and your petitioner was alleged to be found guilty of murder in the first degree, and your petitioner was ordered to suffer death, as will also fully appear by reference to Exhibit "I," hereto attached and made part hereof.

Your petitioner states that he is unlawfully imprisoned, deprived of liberty without due process of law, and denied the equal protection of the laws, in this, to wit:

The constitution of the State of Texas, adopted on the third Tuesday in February, 1876, provided, section 43: "The first session of the Legislature under the constitution shall provide for revising, digesting, and publishing the laws, civil and criminal, and a like revision and digest and publication may be made every ten years thereafter: Provided, that in the adoption of and giving effect to any such digest or revision the Legislature shall not be limited by sections 35 and 36 of this article."

Pursuant to said provision the Legislature, on the 28th day of July, 1876, passed an act authorizing the Governor to appoint a commission of five men, learned in the law, to whom was assigned
3 the duty of making a complete revision and digest of all the laws of the State of Texas and to report to the Legislature what, in their opinion, ought and what ought not to be repealed, and to reconcile conflicts and supply omissions in the law.

In obedience to and in compliance with said act the Governor of he State of Texas appointed commissioners who, on January 7th,

1879, made their report, and submitted to the Legislature of said State a certain printed bill, entitled "An act to adopt and establish a penal code and code of criminal procedure for the State of Texas," which said bill purported to contain a codification of all the penal laws and laws of criminal procedure of said State.

That the said bill so codifying the penal laws and the laws of criminal procedure very materially altered the criminal laws and the code of criminal procedure of said State to the prejudice and detriment of your petitioner and the abridgment of his rights, as will more fully appear later in this petition.

That said bill so prepared by said commissioners or codifiers was introduced into the senate of the Legislature of Texas, and was known and numbered as senate bill No. 20; that said bill was duly referred to a judiciary committee in said senate and reported on; that when said senate bill No. 20 reached the house of representatives in the Legislature of the State of Texas it was not referred to a committee, in compliance with the constitution of said State, which, in section 37, article 3, provides that "no bill shall be considered unless it has been first referred to a committee and reported thereon."

Your petitioner alleges that instead of referring said bill to the judiciary committee, as was required by the joint rules of said Legislature, or to any other committee, section 1 of said bill, consisting of the penal code, was referred to a special committee of 15; that section 2 of said bill, consisting of the code of criminal procedure, was referred to another and separate committee of 15, and section 3 of said bill, consisting of the repealing clause and relating to both sections and codes, and section 4, fixing the time of taking effect, were not referred to a committee, nor were sections 3 & 4 reported on by either of said select committee of 15 or by any other committee, nor was said bill as a whole reported on by either one of said committees of 15 or by any committee whatever.

4 Your petitioner alleges and shows to the court that said bill was not read on three several days in either house of said Legislature, but the constitution of said State provides (section 32, article 3): "No bill shall have the force of law until it has been read on three several days in each house and free discussion allowed thereon; but in cases of imperative public necessity (which necessity shall be stated in a preamble or the body of the bill) four-fifths of the house in which the bill may be pending may suspend this rule, the yeas and nays being taken on the question of suspension and entered upon the journals;" and also (section 39, article 3): "No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until 90 days after the adjournment of the session at which it was enacted, unless in case of an emergency, which emergency must be expressed in a preamble or in the body of the act, the Legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays and entered upon the journals."

And your petitioner further alleges that the senate of said State,

by direct action taken upon the question, affirmatively held that a bill was not passed until it had been read on three several days, and that it might by unanimous consent be read by caption and not *in extenso*.

Your petitioner further alleges that as a matter of fact there was no emergency calling for or demanding the immediate passage of said bill or that required the same to go into force and effect before the expiration of 90 days from the adjournment of said Legislature, and that the truth is, on the contrary, that said Legislature provided that said bill should not take effect or go into force until the expiration of 90 days from the adjournment of the said Legislature, and that the operation of said bill was so postponed and did take effect only after the expiration of 90 days from the last day of the session of said Legislature; and your petitioner particularly alleges that there was no imperative public necessity demanding the immediate passage of said bill, or that the same should have the force of law or go into effect within three days, and that, on the contrary, the operation and active force of said bill was by said Legislature postponed until the expiration of 90 days from the last day of that session of that said Legislature.

5 Your petitioner further alleges that the preamble now standing at the head of said alleged bill, after the enacting clause in the Revised Statutes of Texas, was not embodied in the bill on the 21st day of February, 1879, the date of the alleged adoption of said act, as contemplated by the constitution of the State of Texas, but, on the contrary, was by virtue and force of the supposed authority and power alleged and attempted to be delegated to a certain codifier by acts hereinafter mentioned relative to the printing, binding, and distributing of said codes by him, the said codifier, one John N. Lyle, inserted in said bill subsequent to the 21st day of February, 1879, the day of the alleged passage of said senate bill No. 20.

Your petitioner further shows that said bill was not considered separately and on three several days, though your petitioner alleges the fact to be that said Legislature specially provided that said bill should be so considered on three several days in lieu of the three several readings required by the constitution.

Your petitioner further states that said bill failed to become a binding and effective law in this, that said sixteenth Legislature did not keep a journal of its proceedings as required by the constitution of said State, and that there is no authentic or constitutional record of the passage of said bill or the amendments made thereto, or of any act or thing done relative thereto during its alleged passage through said Legislature; by reason of which your petitioner is now compelled to seek information in certain printed documents or books purporting to be copies of the journals of the houses of said Legislature, which said printed books are incapable of verification and are unreliable, uncertain, and insufficient evidences of the passage of said bill and of its adoption as a law.

Your petitioner claims and insists that he is entitled to the constitutional, authentic, and indisputable record of the doings of the

Legislature of Texas relative to the alleged passage of said bill, and distinctly and positively avers that the journals contemplated by the constitution of the State of Texas, had such journals been kept, would disclose the truth, as your petitioner now alleges it to be, that said two houses—the senate and the house of representatives of the Legislature of the State of Texas—did not, upon the 21st day of February, 1879, the day of the alleged passage of said senate bill, or upon any other day, come to a common understanding
6 and mutual agreement, nor did they unite in one common, similar, or identical legislative intent on the supposod alleged final adoption of said senate bill No. 20, the penal code and code of criminal procedure mentioned herein, and that said bill therein wholly failed of enactment and is void and of no virtue or authority in law.

Your petitioner further states that said senate bill No. 20 was not enrolled as required by joint rule No. 9 of said Legislature, which rule reads as follows, to wit: "After a bill shall have passed both houses it shall be duly enrolled on paper by the enrolling clerk of the house of representatives or senate, as the bill may have originated in the one or other house, and properly signed by the presiding officer of each house, as required by the constitution, before it shall be presented to the Governor."

Your petitioner alleges the truth to be that said joint rule was not complied with, but that, on the contrary, on the 21st day of February, the day of the alleged passage of the said bill, the following resolution was introduced into the house and was adopted by both houses of said Legislature, to wit: "Whereas it will incur an unnecessary and enormous outlay of both time and money to have enrolled the civil and criminal codes passed by this Legislature, as required by joint rule No. 9, 'Therefore be it resolved, the senate concurring, that said joint rule be suspended as far as relates to said codes, and that an enrollment of the amendments made thereto, properly arranged, shall be considered a proper and sufficient enrollment of said codes.'"

Your petitioner alleges that the amendments to said bill were not enrolled and that said resolution was not signed by the speaker of the house of representatives nor by the presiding officer of the senate, nor was said resolution approved by the Governor of the State of Texas, contrary to the constitutional provision of the said State, relative to resolutions, orders, or votes, in section 15, article 4, which reads as follows: "Every order, resolution, or vote to which the concurrence of both houses of the Legislature may be necessary, except on questions of adjournment, shall be presented to the Governor, and before it shall take effect shall be approved by him, or, being disapproved, shall be repassed by both houses; and all rules, provisions, or limitations shall apply thereto, as prescribed in the last preceding section in case of a 'bill.'"

Your petitioner alleges that said attempted abrogation of
7 said joint rule wholly failed, and that there is no enrollment of said senate bill No. 20 or any substitute therefor, and that there is no standard of correctness and nothing in existence which

imparts actual truth and verity relative to said senate bill No. 20, said to contain the penal laws and code of criminal procedure of said State; and your petitioner alleges the truth to be that said senate bill No. 20, said to have been passed by said Legislature, is not identical with the penal code and code of criminal procedure as the same is now current and accepted in the said State of Texas, and under and by virtue of which your petitioner is alleged to be indicted, tried, and convicted by authority of said State, and that there are material differences between said senate bill and the penal code and code of criminal procedure in the Revised Statutes, as will be more fully set out hereafter in this petition.

Your petitioner further states that the senate bill No. 20, alleged to have been passed by the 16th Legislature, was not presented to the Governor, as alleged to have been passed, in this: that certain written amendments were attached to said printed codes so introduced into the senate, which said amendments were not enrolled in the bill as presented to the Governor for his approval, but which amendments, together with other and later amendments, were left by said Legislature to be inserted by said John N. Lyle, which said insertions and codifications made by said Lyle were incorrectly done after said alleged bill had been presented to and considered by the Governor of Texas, as will more fully appear later in this petition, and from the date of the alleged passage and an inspection of said codes.

Your petitioner further alleges that on the 26th day of April, 1879, said 16th Legislature passed an act entitled "An act to provide for the printing, binding, and distribution of the revised civil statutes, penal code, and code of criminal procedure adopted and established at the present session of the Legislature;" which said act is found in the General Laws of the State of Texas, in the acts of the 16th Legislature, regular session, chapter 151.

Your petitioner states the fact to be that the provision in the 2nd section of said act for the appointment of a codifier was inserted in said act long after the introduction of said bill providing for
8 the printing, binding, and distribution of the codes, and was inserted as an amendment to said act on April 19th, 1879 (S. J., p. 970); that the original purpose of said bill was thus changed; that the appropriation for printing, binding, and distribution of the laws was thus diverted and another, a second, and a different subject introduced into said bill from that expressed in the title of the act, in violation of the constitutional provision in the State constitution, section 35, article 3, and section 7, article 8.

Further, your petitioner alleges that at an extra session of said Legislature, begun and held from June the 10th to July 9th, 1879, the Legislature, on July 5th, 1879, amended said act to the effect that said codifier should insert acts of the special session, as fully appears in chapter 20 of the Acts of said Special Session.

Pursuant to said enactments the Governor of the State of Texas appointed said John N. Lyle to codify and digest, repeal, and amend said bill, and the said codifier, pursuant to the provisions of said acts above named, in many and various instances hereinafter re

ferred to, proceeded to codify, amend, repeal, and strike out statutes, and to exercise both legislative and judicial functions, as will also more fully appear by reference to the "Revised Statutes of Texas" and the work of the codifier therein disclosed.

Your petitioner further alleges that the proclamation of the Governor of Texas convening said Legislature in special session made no reference to said codes as a subject of contemplated legislation, nor did the message of the Governor to the Legislature suggest said codes or a codifier as fit or necessary subjects for any enactment on the part of said Legislature in special session convened, and that legislation appointing a codifier or tending to so authorize a codification of the laws of said State and of said extra session was illegal and unconstitutional.

Your petitioner further avers that, notwithstanding the law and the foregoing facts and allegations, the codifier, Jno. N. Lyle, to whom was assigned the task of digesting, codifying, striking out, and amending said bill, proceeded to insert amendments in said bill, to make reference to modifying the laws, to strike out repealed sections and chapters in pursuance of the provisions of said acts,

9 but your petitioner specially avers that said codifier did not confine himself to the execution of said task so attempted to be assigned him, but, on the contrary, he, the said codifier, altered and amended said bill beyond the limits prescribed by the said statutes above designated, as will appear in the following recital, to wit:

By the printed bill and amendments it appears that the said codifier was ordered and directed to insert in article 729 of the Code of Criminal Procedure the words "The judge may not before a verdict convey to the jury his opinion of the code," instead of which the said codifier inserted the words "The judge may not before the verdict convey to the jury his opinion of the case," which said inhibition so attempted to be enacted and left to said codifier to insert in said code would and did tend to preclude your petitioner from any benefit to be derived from an instruction by the court to the effect that said code was not legally enacted and was of no binding or legal effect in the case at bar or any criminal case.

On page 44 of the Penal Code, as the same appears in the printed copy of senate bill No. 20, — the words "All persons not included in the definition of negro shall be deemed a white person within the meaning of this act." The said codifier, interpolating and inserting said amendment in accordance with his supposed and alleged authority under the codifying acts mentioned above, omitted the word "act," in the last line, and inserted in lieu thereof the word "article." On page 62 of the Penal Code, as it appears in the "Revised Statutes of Texas," chapter 2, relative to the "forgery of land titles," the chapter is wholly different from and totally supplants the chapter concerning the same subject as originally submitted by the five original codifiers and embodied in senate bill No. 20, and was in fact an amendment left by the Legislature to be inserted by the said Lyle by virtue of the supposed authority attempted to be conveyed in said acts mentioned above, but your petitioner alleges

that said chapter was not inserted in all respects as designed by the Legislature, which will more fully appear by comparing said chapter in the Revised Statutes of Texas with senate bill No. 20 as the same is on file in the office of the secretary of state of the State of Texas, a certified copy of which senate bill is by your petitioner submitted to your honors and made subject to your order.

Your petitioner further alleges that said codifier, Lyle, was directed and ordered to strike out the words "or of the justice of the
10 peace, mayor, or recorder in which such service was rendered," in section 1085 of the Code of Criminal Procedure, as the same was alleged to have been enacted and as it appears in said certified copy of said senate bill No. 20, but your petitioner alleges the truth to be that said words still stand in the Revised Statutes of Texas as they stood in the original bill, and are now and since September 1st, 1879, have been accepted as the law of the State of Texas, whereas in truth and in fact said Legislature did not seem to intend that said language should remain in said law, and said codifier therein wholly failed to perform the legislative duty attempted to be delegated to him.

Your petitioner avers that said codifier, in pursuance of the supposed authority so attempted to be delegated in said acts above mentioned, did alter and change the text of said senate bill No. 20 as the same has been supposed and alleged to have been passed by the 16th Legislature, in this: Section 152 of the Penal Code, as set out in said bill and as considered and as supposed and alleged to have been adopted by said Legislature, reads as follows: "Any manager or other officer of election who shall unfold or examine any ballot, or who shall examine or permit to be examined by any other person the ballots subsequent to their being received into the bollot-box, except in the manner prescribed by law, shall be punished by confinement in the penitentiary for a term of not less than two nor more than five years;" but your petitioner charges and states that in the last lines of said section fixing the penalty, in section 152 of said bill, the words are altered and changed by said Lyle, in violation of his supposed and attempted instructions and in excess of the authority supposed and attempted to be conferred upon and delegated to him, to read as follows: "Shall be punished by confinement in the penitentiary for a term of not less than one or more than two years." And your petitioner distinctly avers that said change in said penalty was not made in pursuance to any act in terms amending or referring to the Revised Statutes of Texas, but charges the fact to be that said codifier, Lyle, or some other person, without the semblance or color of authority and in violation of said pretended and attempted authority set out in the acts above mentioned relative to the appointment of a codifier, did extract said penalties from an act entitled "An act to amend section 16 of an act regulating elections, approved August 23rd, 1876;" which
11 said amending act was approved April 19th, 1879.

Said act amending act of August 23rd, 1876, is found on page 119 of the General Laws of the State of Texas, and is there numbered as chapter CXII.

Your petitioner alleges that section 153 of said senate bill No. 20 is altered in the same way by the said Lyle by the elimination of the penalty inserted by the Legislature and the substitution therefor of penalties enacted in said act of April 19th, 1879, amending the act of 1876, and having no reference to the "Revised Statutes of Texas."

Your petitioner charges that many other and similar alterations are made by said codifier of the same nature, and particularly that the word "act" in enactments inserted in the code by the codifier is made to read "article," as will more fully and better appear by a comparison of said Revised Statutes of Texas and the certified copy of senate bill No. 20, hereinbefore mentioned. Your petitioner specially emphasizes the transgression of the supposed and alleged authority by the codifier as instanced in his work under the acts mentioned above at article 104 in the Penal Code, in this, to wit:

Chapter 3, relating to the misapplication of public money, as it stands in senate bill No. 20 and as it was supposed to have been adopted by the Legislature, is so altered by the insertion of language and adaptation of articles and figures and penalties and the addition of a supplement, that your petitioner is compelled in fairness to refer your honors to said senate bill No. 20 and the Revised Statutes of Texas that the true, exact, and vital differences may actually appear; but your petitioner alleges that said chapter was so amended and supplemented in this wise:

On the 2nd day of July, 1879, the Legislature, in special session convened, passed an act entitled "An act to better provide for the prompt accounting for and payment of public money by the tax collectors to the proper receiving officers." In the body of said act it was enacted that "the provisions of this act shall be cumulative to the provisions of title 95, chapter 4, of the Revised Civil Statutes, concerning the collection of taxes, and of title 4, chapter 3, of the Criminal Code, concerning the misapplication of public moneys, except where the latter may be in conflict with this act, & the provisions of said titles & chapters where in conflict with this act and all other acts in conflict with this act are hereby repealed." To that act an emergency clause was annexed and the act went into immediate effect July 2nd, 1879. The codifier, acting by virtue of his supposed authority of the delegated power, inserted such portions
12 of that act (paraphrased to conform, in his judgment, to the necessities of the case) as he deemed appropriate and cumulative as a supplement to chapter 3, title 4, of the Penal Code, but the supplement does not contain the language of the act as adopted by the Legislature.

Your petitioner calls attention to the fact, apparent on the face of the act, that the act of July 2nd, 1879, went into immediate effect; that the altered supplement, being thus made a part of the penal code, went into effect ninety days after the session, and later by some days than the act of July 2nd, and that the supplement taken from said act and inserted in the civil code went into effect at high noon September 1st, 1879, and that section 4 of said act of July 2nd, 1879, was thus left annulled, the penalty in that section being practi-

cally repealed and abrogated by the operation of section 103 of the Penal Code, which was left by said codifier unchanged.

Your petitioner avers that other similar instances of alterations of the text of said senate bill No. 20 as supposed to have been enacted occur in different articles of said criminal code and code of criminal procedure, notably in article 173 of the Penal Code, where the said codifier inserted the penalty enacted in an act entitled "An act to amend section 16 of An act regulating elections, approved August 23rd, 1876," and which said act did not purport to amend or refer to the Revised Statutes, and where said codifier omitted and struck out of his own motion the penalty supposed and intended to have been enacted by said senate bill No. 20 as the same appears in the text of said bill.

Your petitioner, Dick Duncan, whose original petition in this behalf was filed in this court April 15th, 1890, now offers this correction of an amendment to said petition.

It is respectfully shown to the court that late and careful investigation discloses to your petitioner that the statement in said original petition that an act was passed by said 16th Legislature on the 26th of April, 1879, "for the printing, binding, and distribution of the revised civil statutes, penal codes, and code of criminal procedure," now known and published as chapter 151 of the acts of 1879, and which alleged act contains the provision for the appointment of the codifier, is inaccurate, in this: that said alleged act was never legally passed by said Legislature at any date, and that the alleged passage occurred on the 24th day of April, 1879, the 26th being the date of the Governor's approval.

Your petitioner avers that said alleged act failed of enactment and is wholly void, in this, to wit, that the same was recognized by said Legislature as senate bill No. 345; that it was not as such bill referred to a committee in the house of representatives or read three several times therein, contrary to the constitution of said State and the rules of said house; and, further, that in the senate of said Legislature the journal thereof does not show that said bill was signed in the presence of the senate by the presiding officer thereof nor was the fact of signature, if any was ever made, ever entered upon the journal of said senate, in violation of the constitution of said State, article 3, section 38.

Your petitioner further says that the certificate attached to the volume known and recognized as the "Revised Statutes of Texas" relates to and covers and only purports to cover the acts of said 16th Legislature at its regular session; but it is particularly stated that said penal code and code of criminal procedure in said Revised Statutes set out, by virtue of which your petitioner was tried, contains matter not enacted at said regular session, and that said penal code and code of criminal procedure, purporting to be the bill alleged to have been passed by said 16th Legislature on the 21st of February, 1879, and purporting to be the penal code and code of criminal procedure of said State by virtue of its alleged passage at said date, is not the bill passed or pretended or attempted to be passed by said Legislature at said date, and, on the contrary, that it

is widely at variance with and unlike the alleged bill of which it purports to be a copy, now on file in the office of the secretary of state of the State of Texas. Wherefore your petitioner prays as in his original petition, of which this is made a part by agreement of counsel and leave of court, this 13th day of May, 1890.

It is further stated that by the supposed and alleged adoption of said penal code and code of criminal procedure and the enforcement thereof by the court, as shown by the above statements and exhibits hereto attached, the immunities and privileges and rights of this petitioner as a citizen of the United States were abridged, in this, to wit, by the penal code of the State of Texas prior to the supposed and attempted adoption of the senate bill No. 20, and as the petitioner holds the law now to be, the statutory provision was, as your petitioner contends now it is, "That the punishment of murder in the first degree shall be death and the punishment of murder in the second degree shall be confinement in the penitentiary for not less than five years."

By the law as your petitioner contends it is and as recognized before the supposed and alleged adoption of said code the jury could not assess the punishment and the court could not imprison
13 for murder in the first degree, of which your petitioner is held to have been accused and tried.

Your petitioner avers that the alleged indictment herein set out is illegal and insufficient, in this :

That the same was not found by the requisite number of jurors, the statute of 1876, the law in force before the alleged adoption of said codes in said State, requiring 16 to constitute a grand jury and to find a bill ; and said indictment is further insufficient in that it does not charge said offence to have been felonious or to have been done feloniously, as required by the law of said State.

Your petitioner complains that his rights, privileges, and immunities as a citizen of the United States have been further abridged, in this, that the alleged code mentioned and under the provisions of which your petitioner was held to trial and is held to have been convicted did not allow your petitioner and allows no defendant a challenge to any array of jurors summoned to try the cause in case said jury was selected by jury commissioners, as required by said code.

And, further, in this, that by the law as it was enacted in 1876, and as your petitioner contends it now to be, sheriffs were prohibited from summoning any person as a juror found within the court house or yard if jurors could be found elsewhere, whereas in fact said jurors trying this petitioner were partially summoned from persons in and about said court house and yard and subject to influences prejudicial to this petitioner, although other jurors could have been secured in the county, contrary to the statute of 1876, which was and is the real and only law governing the selection of jurors in criminal cases in said State.

It is further alleged that the court of appeals of Texas was organized and instituted on the 6th of May, 1876, and that the judges selected to sit upon the bench of said court were elected to occupy such judicial positions on the third Tuesday in February prior to the organization

of said court; that the present presiding judge of said court was at that time elected to a place in said court, and that he has since continuously succeeded himself; that said court is interested in the determination of questions involved in this petition, because the statutes said and supposed to have been adopted in said revised codes made or essayed to make new and important provisions for the exercise of jurisdiction and judicial power by said court, as will
14 more particularly appear by consulting the alleged enactments relative to said court in said Revised Statutes contained; and, as additional cause why your honor should take cognizance and jurisdiction hereof, your petitioner says that the Civil Statutes of said State fixing the salaries of judges, determining jurisdictions, defining judicial districts, and regulating the methods of election of judges in said State were attempted to be enacted at the same time and mainly in the same manner as herein set out with reference to said senate bill No. 20; that a decision by any court of Texas upon the questions herein presented would tend to disturb the alleged and recognized legal system and code of laws of said State, to cloud the title to office of the judges in said State, and subject such court to severe criticisms; that your petitioner has cause to fear and does fear that the courts of Texas would be unduly influenced to the prejudice of your applicant; that your petitioner is held and so imprisoned and unlawfully deprived of his liberty by T. P. McCall, sheriff of Bexar county, Texas, by the supposed virtue of a certain commitment based upon the proceedings set out above, a copy of which commitment is hereto attached and made a part hereof and marked Exhibit "J."

Wherefore your petitioner prays that your honor will take jurisdiction of this matter and issue the writ of *habeas corpus* commanding said T. P. McCall, sheriff of said county and State, to bring before your honor this petitioner, that the foregoing allegation may be verified and your petitioner discharged or made to submit to and receive what the law may require.

(Signed) DICK DUNCAN.

UNITED STATES OF AMERICA,
State of Texas, Bexar County.

Dick Duncan, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that the statements therein contained are true, as he verily believes.

(Signed) DICK DUNCAN,

Subscribed and sworn to before me this 7th day of April, 1890.

[NOTARY'S SEAL.] (Signed) E. B. JOHNSON,
Notary Public, Bexar County, Texas.

THEODORE J. McMINN,
Attorney for Petitioner.

15 EXHIBIT "A."

In the name and by the authority of the State of Texas:

The grand jurors, good and lawful men of the State of Texas, county of Maverick, duly tried by oath by the judge of the district court of said county touching their legal qualifications as grand jurors, elected, impaneled, sworn, and charged at the May term, 1889, of the district court of Maverick county, Texas, to enquire into and true presentment make of all offenses against the penal laws of said State committed within the body of the county aforesaid, upon their oaths present, in the district court of said county, that Dick Duncan, late of the county of Maverick, on or about the 24th day of February, in the year of our Lord one thousand eight hundred and eighty-nine, with force and arms, in the county of Maverick and State of Texas, did then and there unlawfully, wilfully, deliberately, and with express malice aforethought kill and murder Levonia Holmes by then and there striking her, the said Levonia Holmes, with a gun; and the grand jurors aforesaid, upon their oaths in said court do further present that Dick Duncan, late of the county of Maverick, *and* on or about the 24th day of February, A. D. 1889, with force and arms, in the county of Maverick and State of Texas, did then and there unlawfully, willfully, deliberately, and with express malice aforethought kill and murder Levonia Holmes by then and there striking her, the said Levonia Homes, with some blunt instrument and weapon to the grand jurors unknown; and the grand jurors aforesaid, upon their oaths, in said court do further present that Dick Duncan, late of the county of Maverick, on or about the 24th day of February, A. D. 1889, with force and arms, in the county of Maverick and State of Texas, did then and there unlawfully, wilfully, deliberately, and with his express malice aforethought in and upon said Levonia Homes make an assault, and that he, the said Dick Duncan, in some way and manner and by some means, instruments, and weapons to the grand jury unknown, did then and there unlawfully, wilfully, deliberately, and with his express malice aforethought kill and murder her, the said Levonia Homes, against the peace and dignity of the State.

(Signed) C. R. PROUTY,
Foreman of the Grand Jury.

16 EXHIBIT "A" # 2.

THE STATE OF TEXAS, }
County of Meverick. }

I, L. Y. Hancock, clerk of the district court of Maverick county, Texas, do hereby certify that the foregoing is a true and correct copy of the original indictment in case No. 537, State of Texas *vs.* Dick Duncan, now on file in said court.

Given under my hand and the seal of said court, at office, in Eagle Pass, this 10th day of March, A. D. 1890.

[SEAL.] (Signed) L. Y. HANCOCK, *Clerk.*

Endorsements: Names of the witnesses, Geo. B. Du-, W. N. Cooke, Shad. White. No. 537. The State of Texas *vs.* Dick Duncan. Indictment. Offense, murder. Filed 23rd day of May, 1889. L. Y. Hancock, clerk. Amount of bail, $6,000.00.

17 EXHIBIT "B."

In the name and by the authority of the State of Texas:

The grand jurors, good and lawful men of the State of Texas, county of Maverick, duly tried on oath by the judge of the district court of said county touching their legal qualifications as grand jurors, elected, impaneled, sworn, and charged at the May term, 1889, of the district court of Maverick county, Texas, to enquire into and true presentment make of all offenses against the penal laws of said State committed within the body of the county aforesaid, upon their oaths present, in the district court of said county, that Dick Duncan, late of the county of Maverick, on or about the 24th day of February, in the year of our Lord one thousand eight hundred and eighty-nine, with force and arms, in the county of Maverick and State of Texas, did then and there unlawfully, wilfully, deliberately, and with his express malice aforethought kill and murder Beulah Williamson with a gun; and the grand jurors aforesaid, upon their oaths, in said court do further present that Dick Duncan, late of the county of Maverick, on or about the 24th day of February, A. D. 1889, with force and arms, in the county of Maverick and State of Texas, did then and there unlawfully, wilfully, deliberately, and with his express malice aforethought kill and murder Beulah Williamson with some blunt instrument to the grand jurors unknown; and the grand jurors aforesaid, upon their oaths, in said *county* do present that Dick Duncan, late of the county of Maverick, on or about the 24th day of February, A. D. 1889, with force and arms, in the county of Maverick and State of Texas, did then and there unlawfully, wilfully, deliberately, and with his express malice aforethought in and upon Beulah Williamson make an assault, and that he, the said Dick Duncan, in some way and manner and by some means, instruments, and weapons to the grand jury unknown, did then and there unlawfully, wilfully, deliberately, and with his express malice aforethought kill and murder her, the said Beulah Williamson, against the peace and dignity of the State.

(Signed) C. R. PROUTY,
Foreman of the Grand Jury.

18 EXHIBIT "B" # 2.

THE STATE OF TEXAS, }
County of Maverick. }

I, L. Y. Hancock, clerk of the district court of Maverick county, Texas, do hereby certify that the foregoing is a true and correct copy of the original indictment in case No. 539, State of Texas *vs.* Dick Duncan, now on file in said court.

Given under my hand and the seal of said court, at office, in Eagle Pass, this the 10th day of March, 1890.

[SEAL.] (Signed) L. Y. HANCOCK, *Clerk.*

Endorsements: Names of witnesses, Geo. B. Dunn, W. N. Cooke, Shad. White. No. 539. The State of Texas *vs.* Dick Duncan. Offense, murder. Filed 23rd day of May, 1889. L. Y. Hancock, clerk. Amount of bail, $1,000.00.

19 EXHIBIT "C."

In the name and by the authority of the State of Texas:

The grand jurors, good and lawful men of the State of Texas, county of Maverick, duly tried on oath by the judge of the district court of said county touching their legal qualifications as grand jurors, elected, impaneled, sworn, and charged at the May term, 1889, of the district court of Maverick county, Texas, to enquire into and true presentment make of all the offenses against the penal laws of said State committed within the body of the county aforesaid, upon their oaths present, in the district court of said county, that Dick Duncan, late of the county of Maverick, on or about the 24th day of February, in the year of our Lord one thousand eight hundred and eighty-nine, with force and arms, in the county of Maverick and State of Texas, did then and there unlawfully, willfully, deliberately, and with his express malice aforethought kill and murder M. A. Williamson by then and there striking her, the said M. A. Williamson, with a gun; and the grand jurors aforesaid, upon their oaths, in said court do further present that Dick Duncan, late of the county of Maverick, on or about the 24th day of February, A. D. 1889, with force and arms, in the county of Maverick and State of Texas, did then and there unlawfully and of his express malice aforethought kill and murder M. A. Williamson with some blunt instrument and weapon to the grand jurors unknown; and the grand jurors aforesaid, upon their oaths, in said court do further present that Dick Duncan, late of the county of Maverick, on or about the 24th day of February, A. D. 1889, with force and arms, in the county of Maverick and State of Texas, did then and there unlawfully, willfully, and of his express malice aforethought in and upon M. A. Williamson make an assault, and that he, the said Dick Duncan, in some way and manner and by some means, instruments, and weapons to the grand jurors unknown, did then and there unlawfully, willfully, and of his express malice aforethought kill and murder her, the said M. A. Williamson, against the peace and dignity of the State.

(Signed) C. R. PROUTY,
Foreman of the Grand Jury.

20 EXHIBIT "C" # 2.

THE STATE OF TEXAS, }
County of Maverick. }

I, L. Y. Hancock, clerk of the district court of Maverick county,

Texas, do hereby certify that the foregoing is a true and correct copy of the original indictment in case No. 540, State of Texas *vs.* Dick Duncan, now on file in said court.

Given under my hand and seal of said court, at office, in Eagle Pass, on this the 10th day of March, A. D. 1890.

[SEAL.] (Signed) L. Y. HANCOCK, *Clerk.*

Endorsement: Names of witnesses, Geo. B. Dunn, W. N. Cooke, Shad. White. No. 540. State of Texas *vs.* Dick Duncan. Indictment. Offense, murder. Filed 23rd day of May, 1889. L. Y. Hancock, clerk. Amount of bail, $1,000.00.

21 EXHIBIT "D."

In the name and by the authority of the State of Texas:

The grand jurors, good and lawful men of the State of Texas, county of Maverick, duly tried on oath by the judge of the district court of said county touching their legal qualifications as grand jurors, elected, impaneled, sworn, and charged at the May term, 1889, of the district court of Maverick county, Texas, to enquire into and true presentment make of all offenses against the penal laws of said State committed in the body of the county aforesaid, upon their oaths present, in the district court of said county, that Dick Duncan, late of the county of Maverick, on or about the 23rd day of February, in the year of our Lord one thousand eight hundred and eighty-nine, with force and arms, in the county of Maverick, in the State of Texas, did then and there unlawfully, willfully, deliberately, and with his express malice aforethought kill and murder Ben. Williamson by then and there striking him, the said Ben. Williamson, with a gun; and the grand jurors aforesaid, upon their oaths, in said court do further present that Dick Duncan, late of the county of Maverick, on or about the 24th day of February, A. D. 1889, with force and arms, in the county of Maverick, in the State of Texas, did then and there unlawfully, willfully, deliberately, and with his express malice aforethought kill and murder Ben. Williamson by then and there striking him, the said Ben. Williamson, with some blunt instrument and weapon to the grand jurors unknown; and the grand jurors aforesaid, upon their oaths, in said court do further present that Dick Duncan, late of the county of Maverick, on or about the 24th day of February, A. D. 1889, with force and arms, in the county of Maverick and State of Texas, did then and there unlawfully, willfully, deliberately, and with his express malice aforethought on and upon Ben. Williamson make an assault, and that he, the said Dick Duncan, in some way and manner and by some means, instruments, and weapons to the grand jurors unknown, did then and there unlawfully, willfully, deliberately, and with his express malice aforethought kill and murder him, the said Ben. Williamson, against the peace and dignity of the State.

(Signed) C. R. PROUTY,
Foreman of the Grand Jury.

22 EXHIBIT "D" # 2.

THE STATE OF TEXAS, }
County of Maverick. }

I, L. Y. Hancock, clerk of the district court of Maverick county, Texas, do hereby certify that the foregoing is a true and correct copy of the original indictment in case No. 541, The State of Texas *vs.* Dick Duncan, now on file in said court.

Given under my hand and seal of said court, at office, in Eagle Pass, this the 10th day of March, A. D. 1890.

(Signed) L. Y. HANCOCK, *Clerk.*

Endorsements: Names of witnesses: Geo. B. Dunn, W. N. Cooke, Shad. White. No. 541. The State of Texas *vs.* Dick Duncan. Indictment. Offense, murder. Filed 23rd day of May, 1889. Bail, amount of, $1,000.00. L. Y. Hancock, clerk.

23 EXHIBIT "E."

The State of Texas to any sheriff of the State of Texas, Greeting:

You are hereby commanded to arrest Dick Duncan and him safely keep, so that you have him before the honorable district court of Maverick, in said State, at the court-house of said county, in the town of Eagle Pass, *instanter*, then and there to answer the State of Texas upon an indictment pending in said court charging him with the offense of murder. Herein fail not, but due return make hereof to this court *instanter*.

Witness my signature and seal of office this the 23rd day of May, A. D. 1889.

(Signed) L. Y. HANCOCK,
Clerk of the District Court of Maverick County.

Sheriff's Return.

Came to hand on the 23rd day of May, A. D. 1889, and executed the same day by retaining the defendant, Dick Duncan, in the county jail, he having been committed thereto.

(Signed) W. N. COOKE,
Sheriff M. County, Texas.

Endorsement: File No. 537. The State of Texas *vs.* Dick Duncan. *Capias.* Issued the 23rd day of May, 1889. L. Y. Hancock, clerk district court, Maverick county. A true copy of this original *capias* in case No. 537, I certify. L. Y. Hancock, cl'k dist., M'v'k Co., Texas.

24 EXHIBIT "F."

The State of Texas to any sheriff in the State of Texas, Greeting:

You are hereby commanded to arrest Dick Duncan and him safely keep, so that you have him before the honorable district court of

Maverick county, in said State, at the court-house of said county, in the town of Eagle Pass, *instanter*, then and there to answer the State of Texas in an indictment pending in said court charging him with the offense of murder. Herein fail not, but due return make hereof to this court *instanter*.

Witness my signature and official seal on this the 23rd day of May. A. D. 1889.

(Signed) L. Y. HANCOCK,
Clerk of the Dist. Court of M'v'k Co.

Sheriff's Return.

Came to hand on the 23rd day of May, A. D. 1889, and executed the same day by retaining the defendant, Dick Duncan, in the county jail, he having been committed heretofore.

(Signed) W. N. COOKE,
Sheriff M. County, Texas.

Endorsements: File No. 539. The State of Texas *vs.* Dick Duncan. *Capias.* Issued on the 23rd day of May, 1889. L. Y. Hancock, cl'k dist. court, M'v'k Co. A true copy of this the original *capias* in case No. 539, I certify. L. Y. Hancock, cl'k dist. court, M'v'k Co., Tex.

25 EXHIBIT "G."

The State of Texas to any sheriff of the State, Greeting:

You are hereby commanded to arrest Dick Duncan and him safely keep, so that you have him before the honorable district court of Maverick county, in said State, at the court-house of said county, in the town of Eagle Pass, *instanter*, then and there to answer the State of Texas upon an indictment pending in said court charging him with the offense of murder. Herein fail not, but due return make hereof to this court *instanter*.

Witness my signature and official seal this 23rd day of May, A. D. 1889.

L. Y. HANCOCK,
Clerk of the District Court of Maverick County.

Sheriff's Return.

Came to hand on the 23rd day of May, A. D. 1889, and executed same day by retaining the defendant, Dick Duncan, in the county jail, he having been committed thereto.

W. N. COOKE,
Sheriff M. County, Texas.

Endorsement: File No. 540. The State of Texas *vs.* Dick Duncan. *Capias.* Issued 23rd day of May, 1889. L. Y. Hancock, clerk district court, M'v'k county. A true copy of the original *capias* in case No. 540, I certify. L. Y. Hancock, clerk dist. court, M'v'k Co.

26 EXHIBIT "H."

The State of Texas to any sheriff of the State, Greeting:

You are hereby commanded to arrest Dick Duncan and him safely keep, so that you have him before the honorable district court of Maverick county, in said State, at the court-house of said county, in the town of Eagle Pass, *instanter*, then and there to answer the State of Texas upon an indictment pending in said court charging him with the offense of murder. Herein fail not, but due return make hereof to this court *instanter*.

Witness my signature and official seal on this the 23rd day of May, A. D. 1889.

L. Y. HANCOCK,
Clerk of the District Court of Maverick County.

Sheriff's Return.

Came to hand on the 23rd day of May, A. D. 1889, and executed the same day by retaining the defendant, Dick Duncan, in the county jail, he having been committed heretofore.

W. N. COOKE,
Sheriff M. County, Texas.

Endorsement: File No. 541. The State of Texas *vs.* Dick Duncan. *Capias.* Issued the 23rd day of May, 1889. L. Y. Hancock, clerk dist. court, M'v'k county. A true copy of the original *capias* in case No. 541, I certify. L. Y. Hancock, dist. clerk, M'v'k Co.

27 THE STATE OF TEXAS
vs.
DICK DUNCAN. } No. 537.

DECEMBER, 7TH, 1889.

This day this cause was called for trial, and the State appeared, by her district attorney, and the defendant, Dick Duncan, appeared in person, his counsel also being present, and each of the parties announced ready for trial, and the defendant, Dick Duncan, in open court, pleaded not guilty to the charge contained in the indictment herein. Thereupon a jury, to wit, George D. Gould and eleven others, was duly selected, impaneled, and sworn, who, having heard the indictment read and the defendant's plea of not guilty thereto, and having heard the evidence submitted and having been duly charged by the court, retire in charge of the proper officer to consider of their verdict, and afterwards were brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the court and is here now entered upon the minutes of the court, to wit:

We, the jury, find the defendant guilty, as charged in the indictment, of murder in the first degree, and assess his punishment at death.

(Signed) GEORGE D. GOULD, *Foreman.*

It is therefore considered and adjudged by the court that the defendant, Dick Duncan, is guilty of the offense of murder in the first degree, as found by the jury, and that he be punished as has been determined by the jury—that is, with death, and that he be remanded to jail to await the further order of this court.

THE STATE OF TEXAS, }
County of Maverick. }

I, L. Y. Hancock, clerk of the district court of Maverick county, hereby certify that the above is a true and correct transcript of the judgment rendered in the above-entitled cause, as appears of record in the minutes of said court, Book No. 2, pages 345 and 346. In testimony of which I have hereunto set my hand and affixed the seal of office, in the city of Eagle Pass, this the 10th day of March, 1890.

Attest: L. Y. HANCOCK,
[SEAL.] *Clerk District Court, Maverick County, Texas.*

28 EXHIBIT "J."

The State of Texas to the sheriff of Bexar county, Greeting:

You are hereby directed to receive and place in the jail of your county Dick Duncan, who will be delivered to you by the sheriff of Meverick county, Texas. The said Duncan is committed to the jail of your county for safe keeping, he being charged by indictment with murder, and has been tried and convicted upon said charge and his punishment assessed at death, from which conviction he has appealed to the hon. court of appeals of Texas and there being no safe jail in this, Maverick county, in which to confine said Dick Duncan pending said appeal, and you will safely keep the said Dick Duncan confined in the jail of your county and without bail, to await the further order of the honorable district court of Maverick county or myself as judge thereof. The sheriff of Maverick county is required forthwith to convey and deliver to you the said Dick Duncan and this warrant, and you will receipt to said sheriff for this warrant and for the body of Dick Duncan.

Witness my hand, at Eagle Pass, this December 13th, 1889.

(Signed) WINCHESTER KELSO,
Dist. Judge 41st Jud. Dist., Texas.

THE STATE OF TEXAS, }
County of Maverick. }

I, L. Y. Hancock, district clerk in and for said county and State, do hereby certify that the Hon. Winchester Kelso, whose signature appears above, is the district judge of the 41st jud. district of Texas, and that his said signature above is genuine.

Given under my hand and seal of office this 13th day of December, A. D. 1889.

(Signed) L. Y. HANCOCK,
District Clerk, M'v'k Co., Texas.

29 *Order.*

The foregoing petition of Dick Duncan for a writ of *habeas corpus* is directed to be filed in the clerk's office of the United States circuit court at San Antonio, Texas, and the same is ordered set down for hearing upon the 1st day of the next term of said court, or as soon thereafter as counsel can be heard.

A copy of the same is directed to be served upon T. P. McCall, sheriff of Bexar county, State of Texas. The clerk will also notify the district attorney of Bexar county and the attorney general of the State of this order.

April 10th, 1890.

(Signed) DON A. PARDEE,
Circuit Judge.

30 *Ex Parte* DICK DUNCAN
vs.
T. P. MCCALL, Sheriff of Bexar County, Texas, Defendant. } No. 111.

To the Hon. Don A. Pardee, United States circuit judge for the 5th judicial district of the United States:

And now comes T. P. McCall, sheriff of Bexar county, Texas, and respondent in the above numbered and styled cause, and, excepting to the jurisdiction of this honorable court and the judge thereof in the premises, says that neither this honorable court nor the judge thereof have any jurisdiction to hear and determine this cause and to grant the relief prayed, for the following reasons, to wit:

1st. Because the petition filed herein by petitioner shows upon its face that this is not a suit of a civil nature, at law or in equity, involving a controversy between citizens of different States, nor between a citizen of a State and a foreign State, citizen, or subject, in which the amount in controversy exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

2nd. Because said petition shows upon its face that this is not a suit of a civil nature, at law or in equity, arising under the Constitution, laws, or treaties of the United States in which the amount in controversy exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

3rd. Because said petition shows upon its face that the matters in controversy in this proceeding do not arise under the Constitution, laws, or treaties of the United States, nor does the adjudication or determination of the same involve a construction thereof, but that said matters arise solely under the constitution and laws of the State of Texas, and the determination of the same involves, exclusively, a construction of said latter constitution and laws.

4th. Because it does not appear from said petition nor is there any allegation therein that the petitioner, Dick Duncan, is illegally restrained of his liberty and held in custody for an act done or omitted in pursuance of the law of the United States or of an order, process, or decree of a court thereof, or that he is in custody in violation of the Constitution or of a law or treaty of the United States.

5th. Because neither this honorable court nor the judge
31 thereof have any power or jurisdiction to hear or grant a writ of *habeas corpus* releasing from custody the party applying therefor, wherein said party is held by a duly authorized and qualified officer of a State under and by virtue of a judgment of a court of such State in and by which said party has been tried, convicted, and adjudged guilty of a crime against the laws of such State, as appears from the facts set forth in the petition filed herein.

Premises considered, respondent moves and prays this honorable court to dismiss the petition of said Duncan at his cost, and that the relief therein prayed be denied, and that he be left in the custody of respondent until otherwise directed by the laws and constituted authorities of the State of Texas.

(Signed) JAS. S. HOGG, *Att'y Gen'l*, &
RICHARD H. HARRISON,
Ass't for T. P. McCall, Respondent.

And, answering further, if so required to do, respondent excepts to the sufficiency of the petition for writ of *habeas corpus* trial herein and says the same is wholly inadequate and insufficient to authorize the granting of the relief prayed for, because it appears from the allegations and statements in said petition :

1st. That petitioner, Dick Duncan, was arrested by virtue of a *capias* issued out of the district court of Maverick county, Texas, in pursuance of and to an indictment found and presented by the grand jury of said county and State, charging him with the commission of the crime of murder in said county and State in violation of the laws of said State and against its peace and dignity.

2nd. That he was arraigned in the district court of said county and State upon said indictment and the charge therein presented and was duly tried and convicted by a jury of his countrymen of the crime of murder as charged, and was by said court, in accordance with the verdict of said jury, sentenced and is now held by respondent to await the execution of said sentence, unless reversed by the court of appeals of the State of Texas, wherein the same is now pending on appeal from said district court.

3rd. That if the allegations of said petition assailing the
32 validity of the present penal code and code of criminal procedure of the State of Texas be true in every particular, yet said petition is wholly insufficient to authorize the relief prayed, because there is no allegation in the same that the provisions of the old codes, which in such event would have remained in force, were in the least dissimilar from the present, or that he would have been tried in a different way, or that he would have or might receive a different or lesser punishment.

Premises considered, respondent prays judgment that the petition be dismissed at petitioner's cost, and that the relief prayed be denied.

(Signed) JAS. S. HOGG,
Att'y Gen'l, &
RICHARD H. HARRISON,
Assistant for T. P. McCall, Respondent.

Endorsement: No. 111. *Ex parte* Dick Duncan, petitioner, *vs.* T. P. McCall, sheriff Bexar county, Texas, respondent. Filed May 14th, 1890. W. C. Robards, clerk, by —— ——.

33 On the 9th day of May, 1890, the following motion was filed, to wit:

Circuit Court of the United States for the Western District of Texas.

Ex Parte DICK DUNCAN.

Application for Writ of Habeas Corpus.

Suit pending in said court.

Comes now Dick Duncan, applicant in above-entitled suit, by attorney, and moves the court that the writ of *habeas corpus* do issue in this behalf, and that the same be set down for hearing and made returnable on the 13th day of May, 1890.

(Signed) T. J. McMINN,
Attorney for the Defendant.

Ex Parte DICK DUNCAN.

THURSDAY, *May 14th*, 1890.

The application of Dick Duncan for the writ of *habeas corpus* coming on to be heard upon his petition and the answer and the exceptions of T. P. McCall, sheriff of Bexar county, Texas, to the jurisdiction of this court, and the same having been fully argued by counsel and considered by the court, it is now ordered, judged, and decreed by the court that the said application for the writ of *habeas corpus* be, and the same is hereby, refused, and the said writ denied.

To which action of the court the petitioner, Dick Duncan, in open court excepted, and prayed an appeal from the order of the court to the Supreme Court of the United States; which appeal, in open court, is now allowed.

34 UNITED STATES OF AMERICA, }
Western District of Texas, at San Antonio. }

I, W. C. Robards, clerk of the circuit court of the United States for the western district of Texas, at San Antonio, do hereby certify that the foregoing 33 pages of manuscript contain a true and correct

copy of the proceedings had in said court in the case of *Ex parte* Dick Duncan on application for writ of *habeas corpus*.

Given under my hand and the seal of the circuit court, at San Antonio, this 15th day of May, A. D. 1890.

The Seal of the U. S. Circuit Court, Western Dist. of Texas, San Antonio.

W. C. ROBARDS, *Clerk*,
By N. McMASTER, *Dep.*

Endorsed on cover: W. Texas C. C. U. S. No. 1174. Dick Duncan, appellant, *vs.* T. P. McCall, sheriff of Bexar county, Texas. Filed May 19, 1890.

Office Supreme Court U. S.
FILED
OCT 20 1890

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

DICK DUNCAN,
Appellant,
vs.
T. P. MCCALL,
Sheriff, etc.

No. 1,174.

ON APPEAL FROM JUDGMENT OF COURT BELOW DENYING WRIT OF *Habeas Corpus.*

MOTION TO ADVANCE.

Comes the said appellant, and moves the court to advance this cause upon the docket, and hear it at as early day as the convenience of the court will permit, and for reasons therefor, he states:

That he is now held in custody in the jail of Bexar County, Texas, by the said T. P. McCall, under conviction for the crime of murder, the punishment of which is death, which conviction, as he avers in his petition, and he here repeats, is unlawful, and should not be carried into execution, because, as appears by his said petition to the court below, such imprisonment and conviction were had in the 41st Judicial District of the State of Texas, without due process of law. (Rec., pp. 1–19).

And in fact, as averred in his said petition, there was neither, under the law, a grand jury to indict him, nor a court to try and convict him, and by such proceedings in the District Court of the State of Texas the 14th Amendment to the Constitution of the United States was violated.

Wherefore, etc.

T. J. MCMINN,
A. H. GARLAND,
H. J. MAY,
For Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1174.

Dick Duncan,

Appellant,

vs.

T. P. McCall, Sheriff of Bexar County, Texas.

MOTION TO DISMISS.

J. S. HOGG,
Att'y Gen'l, for Sheriff McCall.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

IN THE

Supreme Court of the United States.

DICK DUNCAN, APPELLANT,

v.

T. P. McCALL, SHERIFF OF BEXAR COUNTY, TEXAS.

No. 1174.

Appeal from the Circuit Court of the United States for the Western District of Texas.

MOTION TO DISMISS.

The appellee, by attorney, now comes and says the Court ought not to take jurisdiction of this cause for the reasons:

1. That the record filed herein affirmatively shows, and it is a fact, that appellant was convicted of murder in the District Court of Texas, under and by virtue of the laws of that State, and that long before he invoked the jurisdiction of the Federal courts by writ of *habeas corpus*, he appealed from said judgment of conviction to the State Court of Appeals, in which court of last resort in that State the said case is now pending for decision, and is therein yet undisposed of.

2. That in his petition for writ of *habeas corpus* the appellant affirmatively shows that by due process of the laws of Texas he has had a fair trial in a court of justice, according to the modes of proceeding in said State applicable to such cases.

3. That the record does not show that before, at, or after the trial in the District Court of Texas any title, right, privilege, or immunity under the Constitution, or any law or treaty of the United States was specially set up or claimed by appellant therein, and that it was denied him.

4. That the record does not present a Federal question so as to give this Court jurisdiction of the case.

5. That it contains no bill of exceptions, or fact, upon which the questions of law appellant attempts to raise can be decided by this Court.

Wherefore, appellee prays that due notice hereof be given, and that the Court dismiss this cause.

J. S. HOGG,
Att'y-Gen'l of Texas, for Sheriff McCall.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1890.

DICK DUNCAN,
vs.
T. P. MCCALL,
Sheriff, etc.
No. 1,174.

RESPONSE TO MOTION TO DISMISS.

For response to such motion, appellant begs leave to state, that the appellee mistakes the nature of this proceeding. It is not an original petition before this court, but an appeal from the United States Circuit Court in Texas, taken and prosecuted regularly under the law, and cannot therefore be dismissed without a hearing upon the whole case.

In Re. Neagle, 135, U. S., p. 1.
In Re. Coy, 127 U. S., p. 731.

And it is nothing to the purpose, that the appellant has his case upon the merits before the Court of Appeals of Texas, for if he is in prison, or under arrest against any law of the United States, Constitutional or Statutory, this court will discharge him. Author. Supra and cases cited therein.

The several other matters contained in such motion set forth in sections 2, 3 and 4, present a question that must be argued in full and constitutes the very question at the bottom of this case.

He is prepared to show, he thinks, that the matters

contained in those three several sections are unfounded. This he hopes to do by brief and oral argument through his counsel.

His brief is now on file in this cause, and reference is made to it if the court should consider this motion in advance of the hearing of the cause which is set down for the first Monday in December next.

But the appellant insists, respectfully, that such motion should be postponed until the hearing of the cause regularly.

The attention of the court is here called to the fact that this motion is simply one to dismiss and has not coupled with it the alternative motion to affirm, and the appellee therefore cannot get the benefit under this motion of Arrowsmith *vs.* Harmoning, 118 U. S., p. 194 and Church *vs.* Kelsey, 121 ib., p. 282, cited approvingly in the Spies case, 123 U. S., p. 131.

As to the matters contained in the 5th section of such motion, he says no bill of exceptions was or is necessary, because the case was heard below on the face of the petition and accompanying papers, and a demurrer interposed thereto by the appellee, and exceptions also which were in their nature and effect but a demurrer.

And he says also, that no assignment of errors in the record is, or was necessary, but there is a full assignment of errors in appellant's brief herein on page 77, which meets the requirements of the rule in this respect.

T. J. McMinn,
A. H. Garland and H. J. May,
for Appellant.

IN THE

Supreme Court of the United States.

No. 1,174.

DICK DUNCAN, APPELLANT,

vs.

T. P. McCALL, SHERIFF OF BEXAR COUNTY, TEXAS.

APPEAL FROM U. S. CIRCUIT COURT, WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

By T. J. McMINN,
Of Counsel for Dick Duncan.

MILANS, LAW PRINTER, 519 7TH STREET, N. W., WASHINGTON.

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T. J. McMinn,
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IN THE

Supreme Court of the United States.

No. 1,174.

DICK DUNCAN, APPELLANT,

vs.

T. P. McCALL, SHERIFF OF BEXAR COUNTY, TEXAS.

APPEAL FROM U. S. CIRCUIT COURT, WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

By T. J. McMINN,
Of Counsel for Dick Duncan.

MILANS, LAW PRINTER, 519 7TH STREET, N. W., WASHINGTON.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

DICK DUNCAN,
Appellant,
vs.
T. P. MCCALL.

No. 1,174.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, ON HABEAS CORPUS.

This case comes up on appeal from an order of the court below, denying a writ of habeas corpus to appellant.

His petition was presented to Hon. Don A. Pardee, Judge of the Fifth Judicial Circuit, at New Orleans, on the 10th of April, 1890. Upon that application Judge Pardee indorsed an order at Chambers, setting the application down for hearing on the first day of the next term of the United States Circuit Court for the Western District of Texas, at San Antonio.

Court convened May 5, 1890; by agreement of counsel a hearing was had May 14th, District Judge Thos. S. Maxey alone sitting.

The court, after argument, (record, p. 22,) "ordered * * * that the application * * * be * * * refused and the writ denied."

To which * * * the petitioner * * * in open court excepted and prayed an appeal from the order of the court to the Supreme Court of the United States, which appeal in open court is now (was) allowed." The judgment of the court, it is claimed, was practically on demurrer.

The question involved is, whether or not the "Penal Code and Code of Criminal Procedure" of the State of Texas, now, and since July 24, 1879, recognized as valid law, was legally enacted.

The petitioner states that four alleged indictments for murder were found against him by an alleged grand jury in Maverick County, Texas; that a form of trial transpired on one of said alleged indictments in 1889, the result of which was an alleged judgment assessing the death penalty against the applicant, and that in consequence of said alleged indictments and judgment, he is now illegally imprisoned. He states that the alleged penal code defining crimes, and the alleged code of criminal procedure under the rules, procedure and provisions of which his alleged trial was conducted, were not enacted by the Legislature of the State of Texas; that the definitions and rules in the supposed codes (said to have been adopted February 21, 1879, by the Sixteenth Legislature of said State), by virtue of which the applicant is said to have been convicted, are materially different from the definitions and rules of procedure prevailing before the alleged adoption of said codes; that the constitution of the grand jury by the alleged new code is altered; that the allegations of the indictments as fixed by the alleged new code are different from and *inadequate to the requirements* of the law *prior* to the enforcement of the alleged new code; that the cause for challenge to the array of petit jurors is different from the cause formerly obtaining, and that the trial jury under the alleged new code may assess the pen-

alty for murder in the first degree, which formerly it could not do, and that therein he does not enjoy the equal protection of the laws; that he was not arrested, tried, or convicted by due process of law, or pursuant to the law of the land, that he is restrained of his liberty without due process of law, and that if this court does not interfere by its proper judgment, the State of Texas is liable to deprive him of his life without due process of law.

It is insisted that the writ of *habeas corpus* is a writ of right, and should have been issued, and that the court erred in denying the writ, because the petitioner sufficiently sets up in detail, and with particularity, that the codes embraced in one bill, failed of enactment in this:

That the bill consisted of four sections; first, the penal code; second, the code of criminal procedure; third, the repealing clause; and fourth, the time of taking effect.

That the bill was not read on three several days, although the time of taking effect was postponed ninety days from adjournment.

That the two houses of said Legislature never agreed to, or came to a common legislative intent on the passage of said bill.

That neither House of said Legislature kept a journal of its proceedings.

That an abortive attempt was made to dispense with enrollment; that there is no enrollment of the bill or statute, nor any substitute therefor.

That the bill was not enrolled, and that there is nothing which imports verity—no standard of correctness, and no record in existence by which the accuracy of the alleged statutes can be verified.

That the bill was not referred to a committee, and reported on, in the House.

That the Legislature of said State, having failed to adopt and perfect the bill containing said codes, attempted to delegate legislative power to one Lyle, an agent, who, in pursuance of said attempted delegation of Legislative Power, proceeded to embody into a printed book, the volume known as the "Revised Statutes of Texas," which said volume contains the definitions, rules, provisions and procedure, by virtue of which the petitioner is held to have been tried and convicted, is imprisoned and may be put to death.

That said volume so made by the agent, now known, recognized, and in force as the "Revised Statutes of Texas," is not a copy of or identical with the bill said to have been passed on the twenty-first of February, 1879, embodying the "Penal Code and Code of Criminal Procedure" of the State of Texas, but is widely variant therefrom, and from the original bill on file in the office of the Secretary of State, of said State, of which it purports to be a true copy.

That the alleged bill set out in the "Revised Statutes"—made by the agent mentioned—and pursuant to the provisions of which petitioner was tried, and is imprisoned, was never considered or passed by the Legislature of said State, was not considered by the governor of said State, and did not become a law.

That the printing, binding, distribution and codification of the volume known as the "Revised Statutes," was never duly or legally authorized.

That material differences between the provisions of the law prior to the taking effect of the "Revised Statutes," and the provisions of the latter are set out with some detail, and the inference drawn that petitioner is imprisoned without due process of law.

That the entire civil and penal system of laws is involved; the Civil Bill fixing judicial districts, juris-

diction, salaries, etc., failing of legal enactment through the same or similar illegalities at the same session.

That the State of Texas, her courts and judges are interested parties and that petitioner has cause to fear, and does fear that the Courts of the State would be influenced to his prejudice.

And last and most important the petitioner alleges (record, p. 10,) "that the Court of Appeals * * * was organized and instituted on the 6th of May, 1876, * * * that the judges selected to sit upon the bench of said court were elected on the third Tuesday in February, prior to the organization of that court * * * that the present presiding judge * * * was at that time elected to a place in said court," and has since sat continuously.

CONSTITUTIONAL PROVISIONS.

The constitution of the State of Texas provides:

ART. II, SEC. I: "The powers of the Government * * * shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another, and no person * * * shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." (Rev. St., Texas, 1879, p. 3.)

Also, ART. III, SEC. 30: "No law shall be passed except by bill, and no bill shall be so amended in its passage as to change its original purpose." (Ib.)

Also, ART III, SEC. 37: "No bill shall be considered unless it has been first referred to a committee and reported thereon." * * * (Ib.)

Also, ART. III, SEC. 38: "The presiding officer of each House shall, in the presence of the House over which he presides, sign all bills and joint resolutions passed by the Legislature, after their titles have been publicly read before signing; and the fact of signing shall be entered on the journals." (Ib.)

Also, ART. III, SEC. 32: "No bill shall have the force of a law until it has been read on three several days in each House, and free discussion allowed thereon; but in case of imperative public necessity (which necessity shall be stated in a preamble, or in the body of the bill), four-fifths of the House in which the bill may be pending may suspend this rule, the yeas and nays being taken on the question of suspension and entered upon its journals."

Also, ART. III, SEC. 39: "No law passed by the Legislature, except the General Appropriation Act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of emergency, which emergency must be expressed in a preamble or in the body of the act, the Legislature shall by a vote of two-thirds of all the members elected to each House, otherwise direct, said vote to be taken by yeas and nays and entered on the journals." (Ib.)

Also, ART. IV, SEC. 14; "Every bill which shall have passed both Houses of the Legislature shall be presented to the Governor for his approval." * * (Ib.)

Also, ART. IV, SEC. 15: "Every order, resolution or vote, to which a concurrence of both Houses of the Legislature may be necessary, except on questions of adjournment, shall be presented to the Governor, and before it shall take effect, shall be approved by him, or being disapproved, shall be repassed by both Houses; and all rules, provisions, and limitations shall apply thereto, as prescribed in the * * * case of a bill." (Ib.)

Also, ART. V, SEC. 6: "The Court of Appeals and the judges thereof shall have power to issue the writ of *habeas corpus*." * * * (Ib.)

Also, ART. V, SEC. II: "No judge shall sit in any case wherein he may be interested." * * * (Ib.)

Also, ART. III, SEC. 12: "Each House shall keep a journal of its proceedings and publish the same." * * * (Ib.)

It is contended that "whenever a constitutional provision may be looked upon as merely directory, it is likely to be treated as devoid of even moral obligation and to be habitually disregarded." (Cooley, Con. Lim., Ch. 6.)

THIS COURT HAS JURISDICTION.

Because the Fourteenth Amendment contains these words: "Nor shall any State deprive any person of life * * * without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," *i. e*, the protection of equal laws.

The reading immediately applicable to the case at bar is, "Nor shall any State deprive any person of life * * * without * * * law."

And the other equivalent phrase is, that the prisoner is entitled to trial pursuant to the law of the land, raising the issue. What is the law?

If the allegations of the petition be true, the State of Texas is about to execute a person under the seal of her authority, that person never having been indicted, tried, or convicted pursuant to any statute law of the State. There could be, in the technical sense, neither "process," "due process," nor "due process of law," if the law upon which that "process" issued had no existence.

The alleged "process" issued, and upon which the petitioner was arrested, was not "due process," be-

cause it was not authorized by a legal grand jury, and because not based upon a valid indictment, as required by the real and only statute law of the State, viz., that prevailing prior to July 24, 1879, the date of the taking effect of the alleged "Revised Statutes."

The petitioner is further detained without "due process of law," because the trial jury was not empaneled pursuant to the statutory requirements of the State; that is to say, by the statutory rules and provisions, as recognized and in force prior to July 24, 1879, which constituted the real and only law in existence in said State relative to the constitution, selection, and empaneling of a petit or trial jury. The alleged verdict was rendered by a body of men assembled without authority, selected without law, and serving without warrant; this, because pursuant to the provisions of a new and different system of rules and provisions designed to be, but never enacted into laws.

No judgment could be "due process of law," on a void verdict.

"If a judgment or any part thereof is void, either because the court that renders *it is not competent to do so* for want of jurisdiction, or because it is *rendered under a law* clearly *unconstitutional* * * * *or for any other cause*, then a party imprisoned by virtue of such void judgment may be discharged on *habeas corpus*." (Justice Bradley in U. S. *vs.* Patterson, 29 Fed. Rep., 778.)

The definition of "due process of law," as adopted by this court in 110th report, p. 527, is peculiarly applicable to the case at bar, due process being "intended to *secure the individual from the arbitrary exercise of powers of government*, unrestrained by principles of private right and distributive justice." The execution of the prisoner by an officer of the

State of Texas would be the sacrifice of an individual by the "exercise of arbitrary power unrestrained by the *established* principles of private right and distributive justice."

The petitioner is denied the "equal protection of the laws," because the *laws* have been supplanted by an unadopted code. He is entitled to the operation and protection of the same laws that protected his fellow-citizens more than ten years ago.

Indeed, going down to the very bottom of the matter, this court should hold jurisdiction, because "the United States shall guarantee to every State a republican form of government," and a necessary requisite to a republican form of government is a system of laws legally recognized.

Is that a republican form of government where human life is sacrificed by the powers that be, according to modes of procedure unknown to the statutes of the State, and in flagrant violation of that Constitution which voices *the will of the people?* Such a holding would be to indorse the decrees of vigilance committees, and to ratify the bloody deeds of mobs.

By the very terms of the articles of annexation—by the treaty of admission to the Union—the National Government guaranteed protection to her citizens in the State of Texas and a republican form of government was assured, for it recited (Act of Annex., Sec. 2,) that "the Constitution thereof, with proper evidence of its adoption * * * shall be transmitted to the President of the United States," as a condition precedent to admission, and that Constitution contained this provision: "No citizen of this State shall be deprived of his liberty or privileges or outlawed, or in any manner disfranchised, except by due course of the law of the land." (Const., 1845, Sec. 16.)

And this drives us, by inexorable logic, to conclude that this Court should retain jurisdiction, because a determination of the question presented involves the interpretation of the treaty between the two Republics relative to that political action which resulted in the Statehood of Texas.

It is inconceivable that the State would have been admitted with a provision that any citizen could be sacrificed without due process of law. (See joint resolution of Congress, December. 29, 1845, admitting the State upon acceptance of the conditions.).

The prisoner contends that being one of those whose safety was provided for and guaranteed by that solemn compact, he is entitled to the protection of that justice which will not assent to the enforcement of procedure unknown to the statute laws of the State in which he lives, and which are—having no legal virtue—repugnant to the spirit of the Constitution of the United States.

Moreover, the Constitutions of Texas have always provided that her legislator shall first be a citizen of the United States. To this Government he owes first and highest allegeance, and any infraction of the Constitution of the United States is properly reviewable by the Government, to which he owes that paramount allegiance. Now the provision that no person shall suffer without due process of law, is common to both constitutions—State and National, and a disregard of one in the matter set out is necessarily a breach of the other; personal liberty and safety being the thread of gold that runs through the warp and woop of the American system of government, an infraction of that principle at any point will lead to the destruction of the entire political fabric.

The highest court of criminal jurisdiction in that State has broadly intimated (8th appeals, p 177,) that

it would hold these unadopted codes to be valid law, notwithstanding the invalidating facts herein disclosed. If he cannot find shelter under the protecting aegis of the Federal Constitution, the prisoner is without remedy, and must hang without due process of law.

This court should relieve the prisoner, because "the right of all courts, state as well as national, to declare unconstitutional laws void, seems settled beyond the reach of judicial controversy," and it is not material whether those laws are void, because violative of a State or National Constitution, *if they are void.*

Hurd on *Habeas Corpus*, p. 167, (1858.)
2d Story's Com., sec. 1842.
1st Kent Com., 8 Ed., p. 494.
Searg. Com., Ch. 34.
Marbury *vs.* Madison, 1 Cranch, 173.
Hurd on *Habeas Corpus*, pp. 138, 157, 158, 159, 169, 170, 171, 175.
100 U. S., p. 318.—Virginia *vs.* Rives.
22 Fed. Rep., 701, 6 Sawy, 237.
117 U. S. Rep., Exp. Royall, p. 117.
118 U. S. Rep., Yick. Wo., p. 356.
40 Fed. Rep., Exp. Keiffer, p. 399.
117 U. S. Rep., Exp. Fonda, p. 516.
113 U. S. Rep., p. 579.
92 U. S. Rep.—U. S. *vs.* Cruikshank, p. 555.
120 U. S. Rep., p. 102.
18 Fed. Rep., *in re.* Lee Tong., p. 254, *and authorities cited:* U. S. Rev. Stat., sec. 751–755.

This court has jurisdiction, because "no principle is better settled than that in all cases of concurrent jurisdiction, the court which has first possession must adjudicate," (1st Curtis, 179,) and because the United States Circuit Court, having taken jurisdiction, and

sent the petitioner to this court on appeal, a relegation to the State court, after prolonged imprisonment would work an unreasonable hardship.

(Exp. Kieffer, 40th Fed. Rep., p. 399.

The court should extend speedy relief because the application for a writ of *Habeas Corpus* was made on the 10th of last April, and no writ has yet issued, the operation of the writ has been suspended, although "an unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it is in legal contemplation as inoperative as though it had never existed."

(Norton *vs.* Shelby County, 118 U. S., p. 442.)

It will be conceded that a sovereign *State* has a right to be informed why her citizen is imprisoned.

It is insisted that this court should hold jurisdiction, and extend relief, under the Fourteenth Amendment, because "due process of law" within the meaning of the National Constitution, does not import one thing with reference to the powers of the States, and another with reference to the General Government.

If any given proceedings, conducted by either State or Nation involving life, should be prohibited because not constituting "due process of law," then similar proceedings by the other authority should be deemed illegal if open to the same objections, and it will not be denied that a State could relieve her citizen from imprisonment under a statute of the United States, if it should be discovered, and could be established that the statute under which he was held had never been adopted and was void.

The *lawful* claim of a *State* is one thing, and the *unlawful claim* of a *State officer* is another. and a wholly different thing.

This Court should extend relief, because the State Court of Appeals is incompetent to sit in the case.

Before the alleged adoption of the "Revised Statutes" in question, the Supreme Court of the State of Texas had power to issue the writ of *Habeas Corpus*.

(Paschal's Digest, Art. 1579).

The Constitution of 1876 originated the Court of Appeals, and provided for legislation to make it effective.

By article 1069 of the present alleged code, that power was vested in the Court of Appeals, and chapter 3, title 26, "Revised Statutes" of Texas, fixing the jurisdiction and defining the powers of the Supreme Court, omits the power to issue the writ of *Habeas Corpus*.

If the petitioner had asked the Court of Appeals for a writ of *Habaas Corpus*, he would have conceded what he disputes, viz: the power to issue the writ.

Both courts—the Supreme Court having civil appelate jurisdiction and the Court of Appeals having criminal appelate jurisdiction—recognize the alleged code as the law of the State, and the Court of Appeals, should it hold with the petitioner, would effect its own jurisdiction, its authority to sit, its emoluments, and would disturb the judicial system of the State, and invoke the severest criticism.

It is interested.

That this position is not groundless is abundantly established by the following facts, to-wit:

A certain case, entitled, Usener *vs.* the State, was heard by the Court of Appeals and may be found in 8th Texas Appeals, page 177. In that case, Usener was indicted for an infraction of the Sunday Law. That law, section 186, Penal Code, was an amendment to the code during its alleged passage as a bill. The point made was that the Sunday Law had not been read on three several days.

Particular attention is given in this brief to a consideration of that decision because the court below cited that case as authority.

The Usener decision was reversed and distinctly held to be "*mere dictum*" by the same court that rendered the decision; see 22 Texas Appeals, page 396, State *vs.* Hunt.

In the Usener case the court virtually admitted—what appears on the face of the alleged statutes—that the bill had not been read on three several days, but held that that one defect in the passage of the bill, if unaccompanied by other failures to comply with constitutional requirements, would not alone invalidate the law.

No other points were made, presented, or considered in the Usener case. The validity of the statutes was not in question. That case was not this case.

Here the validity of the statutes is the point at issue; the want of three several readings is accompanied by numerous other alleged defects, any one of which, it is claimed, would invalidate the code, and is particularly accompanied by the defects inferentially pointed out by the Court of Appeals in the Usener case as fatal to the validity of the statutes, if established in connection with the failure to read on three several days.

The court used this language:

"Notwithstanding it is admitted that this bill was passed, was signed by the presiding officer of each House, in the presence of the House over which he presided, was presented to the Governor, and became a law according to all other constitutional rules, and has been published and promulgated as part of the law of the State, and notwithstanding it comes to us fully accredited as a valid subsisting law upon our statute book, we are asked to wade through the *dis-*

jecta membra of the antecedent proceedings with reference to it, as they may be found in the journals, and if upon inspection we should find any omission of a literal compliance with the above provision of the constitution, to seize upon and hold it as the best evidence of its invalidity and conclusive of its unconstitutionality."

"We will state for the information and satisfaction of learned counsel that without feeling in duty bound to do so in the adjudication of the case, we yet have, nevertheless, as a matter of curiosity, and for our own personal gratification, examined the journals of the two Houses, both with regard to the original bill entitled "An Act to Adopt and Establish a Penal Code, and a Code of Criminal Procedure for the State of Texas," and "the Amendment to Art. 186, the Sunday Law," specially attacked in this case, and the result of our examination is that the two acts have received the legislative sanction in strict conformity with the constitutional requirements, and if driven to the journals for authority to declare these acts constitutional, do not hesitate to say we are of opinion we would find no difficulty in the way of establishing the fact by them in every essential particular."

To appropriate the idea of Judge (now Justice) Brewer in the Kieffer case, reported in the 40th Federal Reporter, 399, the State Court of Appeals has been experimented with and is against the petitioner.

If a delay should be compelled involving a circuitous appeal through the State courts, many others condemned under the same alleged law would be liable to suffer death before a final decision could be reached in this court.

It is true that the Usener decision was subsequently dissected and very properly held to be what it transparently is, "mere dictum," but while it has no

weight or authority in law, the petitioner insists that it strongly supports the allegation that he "has cause to fear, and does fear," that the courts of Texas being interested and subject to criticism would be influenced to his prejudice.

In the case at bar, it is not "admitted this bill was passed"—it is denied.

It is not "admitted that it became a law according to all other Constitutional Rules"—it is denied.

It is not admitted that "it comes to us a valid, subsisting law"—it is denied, and the court is respectfully asked to "wade through the '*disjecta membra*' of the antecedent proceedings with reference to it as they may be found in the journals," and if upon inspection you should find material omissions to comply with the constitutional requirements, to pronounce the statute unconstitutional and void, believing as I do, that to "wade through the '*disjecta membra*' is the right of an imprisoned citizen, and the peculiar province and duty of a court.

THE COURT OF APPEALS INTERESTED.

It is conceded that the contention here advanced is delicate and full of difficulty. Nevertheless, the facts warrant attention. The language of the decision is that the facts of the passage of the bill had been examined. If all the facts alleged in the petition were discovered—and they were plainly discoverable—it is true beyond question that the dictum of the judge plainly indicates a purpose to hold the law valid, *nolens volens;* to stand against confusion and to sustain the alleged code that provides the judicial system of the State.

There is much to warrant the statement that a strong minority of the citizens of Texas endorse that judgment and purpose in the interest of what is deemed a

wise public policy. But a citizen of the United States is not confined to local sentiment or judgment of public policy, when that locality, state or court is interested in holding that to be a law which is palpably repugnant to the National Constitution. The Fourteenth amendment is his place of refuge.

Says Locke on Civil Government: "Those who make the laws" are to be governed by *established*, promulgated laws, not to be varied in particular cases, but to have one rule for the rich and the poor, for the favorite at court, and the countryman at the plow," and it would do violence to intelligence to assume that such laws may be held valid, if not "established" in pursuance of the mandatory requirements of the constitution.

If the state authorities disregard the mandatory requirements of the State Constitution and sacrifice life without law the United States should protect *her citizen* till there is law, for an unconvicted citizen of the United States is more sacred than a wrong doing state in the eye of the National Constitution. The adoption of a State Constitution insuring the legal adoption of laws and the protection of life and liberty, was a prerequisite to statehood and of membership in the Union.

Can the state insult the citizen who made her, and justice by whose gracious leave she lives, and in answer to a charge of wrong doing defiantly say "I am a sovereign?"

Said Lord Coke, "Even an act of parliament made against natural equity, as to make a man judge in his own case is void in itself; for *Jura naturae sunt immutabilia*, and they are *leges legum*."

The court pronouncing the opinion in the Usener case is a part of the judicial system involved, and is itself peculiarly interested as the alleged code abundantly discloses.

It must rely upon the code in question for authority to issue or deny the writ of *Habeas Corpus;* it is disqualified.

Judge Cooley in his "Constitutional Limitations," I think supports this view strongly in chapters 10 and 11.

"The provision that the Judge shall be disinterested is to have no technical or strict construction, but is to be broadly applied whenever one is appointed to decide on the rights of his fellow men."

12 Mass., 223.

To the same effect, the last allegation of the petition is, that the Judges of the Court of Appeals were elected in February, 1876, and that the court was "organized," called into existence, and the Constitution made operative in May following. But, "there can be no officer * * * if there be no office to fill."

(Norton *vs.* Shelby Co., 118 U. S., p. 442.)

Says Blackstone: "If parliament give a man power to try all causes in his manor of Dale, yet, if a cause arise in which he himself is party, the act is coustrued not to that case, because it is unreasonable that any man should determine his own quarrel."

In the case at bar it does equal, even greater violence to reason to assume that a court should sit and pass upon the question of its power to adjudicate. It is here denied that "power to try" exists. (Later in the brief it will be seen that the Judges are not even elected.)

105 Mass., 83; 25 Mch., 83; 3 N. Y., 547; 20 Mch., 26; 3 Cush., 352–4; 13 Gray, 12; 21 Pick., 101.

THE "REVISED STATUTES" NOT LAW.

"THE REVISED STATUTES," contains within its lids two alleged bills, both purporting to be laws of the State of Texas by force and virtue of their supposed passage by the Sixteenth Legislature, on the 21st day of February, 1879.

The first purports to be the Civil Statutes, and the second bill purports to be the "Penal Code and Code of Criminal Procedure" in question.

I speak now of the second and contend that it shows upon its face and the context that—

It never was a bill.

That it never was introduced or considered as a bill.

That it was never passed, signed or presented to the governor for consideration.

That it never was, and is not now law, for Lyle either codified *laws* or enrolled a *bill*, neither of which he was competent to do.

The "Penal Code and Code of Criminal Procedure" in the "Revised Statutes," bears its own death wound.

A certified copy of that which without Legislative or legal warrant, has been left in the place of an enrollment of Senate Bill No. 20, is wholly unlike that which is current and accepted as such in the "Revised Statutes" though both bear the same enacting clause and the alleged bill in the Revised Statutes has been recognized as a correct copy of Senate Bill No. 20, the P. C. and C. C. P. assumed to have been passed February 21st, 1879.

Says Blackstone: "The trial of this issue—nul-tiel record—is merely by the record; for as Sir E. Coke observes, a record or enrollment is a monument of so high a nature and importeth in itself such absolute verity, that if it be pleaded there is no such record, it shall be only tried by itself."

The title page of the "Revised Statutes" reads as follows:

THE

REVISED STATUTES OF TEXAS

ADOPTED

BY THE REGULAR SESSION

OF THE

SIXTEENTH LEGISLATURE,

A. D. 1879.

Published by authority of the State of Texas.

(Pursuant to chapter 151, Acts 1879.)

GALVESTON:

A. H. BELO & CO., State Printers,

1879.

The title page to the Penal Code, contained in the same volume, reads as follows:

THE

PENAL CODE

OF THE

STATE OF TEXAS,

PASSED BY THE

SIXTEENTH LEGISLATURE,

FEBRUARY 21, 1879,

TOOK EFFECT JULY 24, 1879.

GALVESTON:

A. H. BELO & CO., State Printers.

It will be observed that the page first quoted announces that the statutes were adopted by the "Regu-

lar Session," and both agree in the statement that the laws were passed on the 21st of February, 1879.

The representation thus made that the alleged codes contained in the volume named, were passed February 21, 1879, is not justified by the following facts:

On page 14 of the Penal Code, Article 97, a marginal reference is found to "Acts 1879, ch. 150, p. 165."

Turning to the page and chapter indicated, it is discovered that "Article 97" is an alleged amendment to the Penal Bill supposed to have been passed February 21, 1879, and this attempted amendment is marked "approved April 24, A. D. 1879," more than two months after the alleged passage of the penal code. How could any agent, power or authority make a *law* passed April 24th, part of a *bill* adopted February 21st of that same year?

A comparison of the attempted amendment to article 97 as it stands in the Penal Bill, with the act of April 24th, 1879, discloses that the language of the amending act has not been accurately inserted.

The title of the amending act, reads as follows:

"An act to amend article 97, chapter three, title four, Penal Code of an "act to adopt and establish a Penal Code and a code of criminal procedure of the State of Texas, "passed February 21st, 1879."

This title it is respectfully submitted, does not express the subject of the enactment.

Authorities:

The Borrowdale, 39 Fed. Rep., page 376. Relative to title of acts, the constitutional requirements are almost without exception, held to be mandatory.

(Cooley's Const. Lim., ch. 6).

There are 821 articles in the Penal Code; that code had not been published or circulated, and did not go into effect until July 24, 1879, and was *not certified*

and *circulated* till September 6, 1879. How could that title enlighten either a legislator or the public?

Article 97 as it appears in the original bill on file in the office ot the Secretary of State, is displaced, and the amendment mentioned stands in the published Penal Code in lieu thereof.

On page 15 of the Penal Code, as published in the "Revised Statutes" next after article 104, there appears a "supplement." No supplement stands at this place in the original bill.

A marginal reference cites ("Acts 1879, extra session, Ch. 8, Secs. 4, 5 and 6.")

An inspection of the chapter cited, shows that on July 2, 1879, at an extra session, an act was approved entitled—

"An Act to Better Provide for the Prompt Accounting for and Payment of Public Moneys by Tax Collectors to the Proper Receiving Officers."

It was provided that that act should go into immediate effect—July 2, 1879.

Some portions of it—the sections cited—are linguistically reshaped and made part of the Bill passed February 21, and which is said to have taken effect July 24, 1879.

It is a manifest impossibility for the inserted supplement of July 2, to have become a part of the "*Original Bill*" alleged to have been passed February 21, 1879. The act from which the paraphrased "supplement" was extracted took effect by its terms *twenty days before* the Penal Code said to have been enacted February 21, had the force of a law.

On page 23 of the Penal Code (revised statutes) article 152 in the last line, the penalty reads "for a term not less than *one* nor more than *two* years."

In the original bill, same article and line—the other language being identical—the penalty reads "not less than *two* nor more than *five* years."

A marginal reference (Revised Statutes, Penal Code), cites: ("Acts 79, ch. 112, p. 119).

Turning to that page of the general laws of the State, the following act is found:

"An act to amend section 16 of 'an act regulating elections,' approved August 23, 1876."

SEC. 1. *Be it enacted by the Legislature of the State of Texas*, That section sixteen (16) of "an act regulating elections," approved August 23, 1876, be so amended as hereafter to read as follows:

SEC. 16. That each of the clerks shall write and number the name of each voter at the time of voting; and one of the judges in every case at the time of receiving the tickets or ballots, shall write upon it the voter's number, corresponding with the number on the clerk's list, and no manager or other officer of the election shall unfold or examine the vote received, nor shall they, or any one of them, examine the indorsements on any ticket, by comparing it with the clerk's list of voters when the votes are counted out, nor shall they examine, or permit to be examined, by any other person the tickets subsequent to their being received into the ballot-box, except as hereinafter provided; and any presiding officer, judge or clerk of election, who shall violate any of the provisions of this section, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the State penitentiary not less than one nor more than two years. All ballots shall be written or printed on plain white paper, without any picture, sign, vignette, device or stamp mark, except the writing or printing in black ink or black pencil of the names of the candidates and the several offices

to be filled, and except the name of the political party whose candidates are on the ticket; *provided* such ballots may be written or printed on plain white fool's-cap, legal-cap or letter paper; *provided* that all ballots containing the name of any candidate, pasted over the name of any other candidate, shall not be counted for such candidate whose name is so pasted, and any ticket not in conformity with the above shall not be counted in counting out the votes, and no ticket not numbered as provided in this act shall be counted in counting out the votes, nor shall either of two or more tickets folded together be counted; and any person who shall deposit any ballot, except as provided in this section, or shall deposit two or more tickets folded together at any election in this State shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding one hundred dollars. That immediately after the counting of the votes by the managers of election, the presiding officer shall place all the tickets or ballots voted into a wooden or metal box of sufficient size to contain them, and securely fasten the same with nails, screws or locks; and he shall within five days after the election deliver said box to the county clerk, whose duty it shall be to keep the same securely, and in the event of any contest growing out of the election, within one year thereafter, he shall deliver said box to any competent officer having a writ or subpœna therefor from any tribunal or authority authorized to issue such process; and in the event that no contest grows out of said elections within one year after the election, then said clerk shall destroy the said tickets or ballots by burning the same; nor shall he examine said ballots to ascertain how any person voted or permit any person to do the same while in his keeping. The violation of any of the provisions of this section shall be deemed a misdemeanor, and any person con-

victed thereof shall be punished by fine not less than fifty nor more than five hundred dollars, and may in addition thereto be imprisoned in the county jail not to exceed six months. Any presiding officer, judge or clerk of any election, who shall divulge how any person shall have voted at any election from an inspection of the tickets, unless in a judicial investigation, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than one hundred nor more than five hundred dollars. App., April 19, 1879.

It is respectfully submitted that these clauses, to-wit:

"And any presiding officer, judge or clerk of election, who shall violate any of the provisions of this section, shall be deemed guilty of felony, and upon conviction thereof shall be punished by imprisonment in the State pententiary not less than one nor more than two years. * * * and:

"Any presiding officer, judge or clerk of election who shall divulge how any person shall have voted at at any election, * * * shall be deemed guilty of a misdemeanor and * * * shall be fined in any sum not less than one hundred, nor more than five hundred dollars," and:

"The violation of any of the provisions of this section, shall be deemed a misdemeanor and any person convicted thereof, shall be punished by fine not less than fifty, nor more than five hundred dollars, and may in addition thereto be imprisoned in the county jail, not to exceed six months," are utterly repugnant and irreconcilable and that said act is in consequence unconstitutional, inoperative and void. "A statute contradictory and absurd may be declared void;" Campbells case, Bacon's Abridgment, vol. 9, page 243.

It is also clearly void for want of a subject expressed in the title.

Nevertheless, the punishments therein set out have found their way into, and have taken the places of punishments originally written in Senate Bill No. 20, of which the Penal Code and Code of Criminal Procedure set out in the "Revised Statutes of Texas," purports to be a true and accurate copy, as fully appears by an inspection of articles 152, 153 and 173 of the certified copy of original bill submitted in evidence in this case, and by comparing the same with articles 152, 153, 173 of the Penal Code, as set out in the "Revised Statutes of Texas.

The elimination of the penalties in the original bill and the insertion of the penalties named in the act quoted above in the place thereof, by the codifier, Lyle, account for the differences cited in Sections 152, 153 and 173 of the Penal Code as printed in the Revised Statutes, and the penalties set out in the same numbered articles of the original bill.

It is claimed in consequence, that the Penal Code as current in the "Revised Statutes of Texas," is not the Penal Code alleged to have been enacted by the Sixteenth Legislature, February 21st, 1879, in Senate Bill No. 20, of which bill the "Penal Code, and Code of Criminal Procedure" in the "Revised Statutes of Texas," purports to be a certified copy.

How could any agent, power or authority make an unconstitutional law, app. April 19th, 1879, part of a bill alleged to have been passed February 21st, 1879.

Not to consume time or space with further instances (of which there are several) from the Penal Code, attention is now directed to Article 560 of the code of criminal procedure, as it appears in the "Revised Statutes of Texas." It reads as follows:

"ARTICLE 560. In the first application by the defendant for a continuance, it shall be necessary if the same be on account of the absence of a witness to state under oath:

1. "The name of the witness, and his residence if known, or that his residence is not known.

2. "The diligence which has been used to procure his attendance, and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for a subpœna in cases where the law authorizes the issuance of an attachment.

3. "The facts which are expected to be proved by the witnesses, and it must appear to the court that they are material.

4. "That the witness is not absent by the procurement or consent of the defendant.

5. "That the application is not made for delay.

6. "That there is no reasonable expectation that the attendance of the witness can be secured during the present term of the court by a postponement of the trial to some future day of said term, and the truth of the first, or any subsequent application, as well as the merit of the ground set forth therein, and its sufficiency shall be addressed to the sound dsscretion of the court called to pass upon the same, and shall not be granted as a matter of right:

Provided, that should an application for a continuance be overruled, and the defendant convicted, if it appears upon the trial that the evidence of the witness or witnesses named in the application was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted and the cause continued to a future day of the same term."

ARTICLE 560. Code of Criminal Procedure in the original Senate Bill No. 20, of which the "Penal Code and Code of Criminal Procedure," set out in the "Revised Statutes," purports to be a true and accurate copy, reads as follows, to-wit:

ARTICLE 560. "It shall be sufficient upon the first application by defendant for continuance, if the same be for want of a witness to state:"

1. "The name of the witness and his residence, if known, or that his residence is not known."

2. "The diligence which has been used to procure his attendance, and it shall not be considered diligence to have caused to be issued, or to have applied for a subpœna in cases where the law authorizes the issuance of an attachment."

3. "The facts which are expected to be proved by the witness, and it must appear to the court that they are material."

4. "The witness is not absent by the procurement or consent of the defendant."

5. "That the application for continuance is not made for delay."

A marginal reference, (not in the original bill,) in the Code of Criminal Procedure as printed in the "Revised Statutes" at the article mentioned, cites, "(Acts 1879. Ch. 82, p. 94.)"

Investigation of the general laws of the State of Texas, of the year 1879, at page 94, reveals the following:

"An act to amend Articles 560 and 561, of an act to adopt and establish a Code of Criminal Procedure for the State of Texas," as adopted by the Sixteenth Legisture.

SEC. 1. Be it enacted by the Legislature of the State of Texas, that Articles 560 and 561 of "an article to

adopt and establish a Code of Criminal Procedure for the State of Texas," as adopted by the Sixteenth Legislature be so amended as to read as follows:

ART. 560. In the first application by the defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness to state under oath:

First. The name of the witness and his residence, if known, or that his residence is not known.

Second. The diligence which has been used to procure his attendance, and it shall not be sufficient diligence to have caused to be issued, or to have applied for a subpœna in cases where the law authorizes the issuance of an attachment.

Third. The facts which are expected to be proved by the witness and it must appear to the court that they are material.

Fourth. That the witness is not absent by the procurement or consent of the defendant.

Fifth. That the application is not made for delay.

Sixth. That there is no reasonable expectation that the attendance of the witness can be secured during the present term of the court by a postponement of the trial to some future day of said term, and the truth of the first or any subsequent application, as well as the merit of the grounds set forth therein, and its sufficiency shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right. *Provided*, that should an application for continuance be overruled, and the defendant convicted, if it appear upon trial that the evidence of the witnesses named in the application was of a material character, and that the facts set forth in said application were prob-

ably true, a new trial should be granted, and the cause continued for the term or postponed to a future day of the same term."

(Sec. 561 is not discussed because it would only take time and space for cumulative argument.)

That act so amending Article 560 of the Code of Criminal Procedure was approved April 14th, 1879, nearly two months after the alleged passage of Senate Bill No. 20 entitled "an act to adopt and establish a Penal Code, and a code of Criminal Procedure for the state of Texas."

It is, therefore, contended as obvious that no portion of the act of April 14th, 1879, *could become a part* of the bill said to have been passed February 21st, previous, and which had become a law—if legally passed, not later than March 9th, 1879.

It is contended that it does not sufficiently appear from the title of the Act of April 14th, that it was an amendment to the act bearing the title immediately above quoted—the amending act sets out a title wholly different from that under which the Code of Criminal Procedure appears in the Revised Statutes, and in the original Senate Bill No. 20.

Finally, it is contended that the amending act quoted approved April 14th, 1879, is void because no subject is expressed in the title contrary to the constitutional requirements relative to titles and which is quoted on a former page of this brief.

Authorities:

35 N. Y., 449, 453; 50 N. Y., 553; 4 N. E. Rep., 625; 28 N. E. Rep., 101; 28 N. W. Rep., 241; 14 Ind., 195; 39 Mch., 195; 56 Cal., 3; 61 Am. Decisions, 331; 2 1Mch., 421; 13 Mch., 495.

On page 87 of the Code of Criminal Procedure as printed in the Revised Statutes of Texas, the second

and concluding sentence of Article 729 reads as follows, to wit: "Nor shall he" (the judge) "at any stage of the proceedings previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the *case*."

In the original bill—Senate Bill No. 20, of which the "Revised Statutes of Texas" purport to set out an accurate copy, the corresponding sentence of the same title, chapter and article reads thus—

"Nor shall he at any stage of the proceedings previous to the return of the verdict make any remark calculated to convey to the jury his opinion of the *code*."

Did the Legislature seek to avoid an investigation of the irregularities now for the first time disclosed? The effect would be to deprive the prisoner of a proper instruction—if Senate Bill No. 20 really became a law.

Whatever the purpose, or remarkable error, in any case the Code of Criminal Procedure set out in the "Revised Statutes" is not—as it purports to be— a correct copy of Senate Bill No. 20 supposed to contain the original of the Code of Criminal Procedure.

The same elimination of articles in the original bill, and the substitution of others enacted later, are to be found scattered through the codes, but to cite them all would be unnecessarily cumulative.

In many instances—as in the case of the supplement mentioned above—the language of the amending act is not preserved.

SECTION 3 of the original bill—Senate Bill No. 20, of which the "Revised Statutes of Texas" purports to set out a true copy—reads as follows:

"Be it further enacted that all penal laws and all laws relating to criminal procedure in this State that are not embraced in this act, and that have not been enacted during the present session of this legislature, be and the same are hereby repealed."

It is insisted (the penal laws of 1876 being thereby repealed) that no amendment of any law of 1876 (if the Penal Code and Code of Criminal Procedure was really enacted) could be operative, or of any effect; nevertheless, amendments to laws of 1876 have been made part of the "Revised Statutes of Texas" as appears by the discussion above, relative to articles 152, 153 and 173 of the Penal Code.

SEC. 4 of the original bill, Senate Bill No. 20 of which "the Revised Statutes of Texas purports to set out a true copy, reads as follows, to-wit:

"Be it further enacted, that this act take effect from and after the expiration of ninety days *from the passage of the same.*"

SEC. 4 of the original bill does not appear in the "Revised Statutes of Texas," which purports to set out a true copy of Senate Bill No. 20, the supposed original of the "Penal Code and Code of Criminal Procedure." It will be observed that the law should have taken effect ninety days after passage or ninety days after February 21st, that is to say, May 21st, 1879.

In obedience to some unknown authority of which I have found no record or trace, the fourth section was dropped out, and the alleged law took effect pursuant to the Constitution, ninety days after adjournment of the Legislature, July 24th, 1879.

The certificate of the Secretary of State, attached to the "Revised Statutes of Texas," which purports to contain a true copy of Senate Bill No. 20, the original of the "Penal Code and Code of Criminal Procedure" is as follows, to-wit:

"DEPARTMENT OF STATE,
AUSTIN, TEXAS.

I, John D. Templeton, Secretary of State, of the State of Texas, do hereby certify that the foregoing

volume is a true and correct copy of the original bills on file in this department. And I do further certify that the regular session of the Sixteenth Legislature of the State of Texas, convened at Austin, on the fourteenth day of January, A. D. 1879, and adjourned on the twenty-fourth day of April, A. D. 1879.

In testimony whereof, I do hereto sign my name and affix the seal of said State, at the City of Austin, on this sixth day of September, A. D. 1879.

(*Signed*) JOHN D. TEMPLETON,
[SEAL] *Secretary of State.*"

It is insisted that this certificate is wholly inadequate, because several of the articles in the "Penal Code and Code of Criminal Procedure," as set out in the "Revised Statutes of Texas," were enacted at the special session of said Legislature, and particular attention is called to Article 896 of the Code of Criminal Procedure where the marginal reference cites: "(Acts 1879, extra session, Ch. XIX.")

Investigation discloses the following, to-wit:

"An act amending article 896, chapter one, title eleven, code of criminal procedure, approved April 24, 1879."

Be it enacted by the Legislature of the State of Texas, That hereafter article 896, chapter one, title eleven, of the Code of Criminal Procedure shall read as follows:

ART. 896. The jurisdiction given to mayors and recorders of incorporated towns and cities shall not prevent justices of the peace from exercising the criminal jurisdiction conferred upon them; but in all cases where there is an incorporated town or city within the bounds of a county, the justice and the mayor or recorder shall have concurrent jurisdiction within the limits of such town or city. And no person shall be punished twice for the same act or omis-

sion, although such act or omission may be an offense against the penal laws of the State, as well as against the ordinances of such city or town; *provided* that no ordinance of a city or town shall be valid, which provides a less penalty for any act, omission or offense than is prescribed by the statutes where such act or omission is an offence against the State."

That act contained an emergency clause, and went into immediate effect *July* 5, 1879.

The certificate of the Secretary of State says that the regular session adjourned on the *24th day of April*, 1879.

But the article just quoted took the place of article 896 in the original bill, which was materially different.

The points now made relative to the article above set out are:

It is not covered by the certificate of the Secretary of State, having been enacted after adjournment of the regular session.

The title to the amending act does not describe the act alleged to have been passed, February 21st, 1879, containing the Penal Code and Code of Criminal Procedure, for that act was not "approved April 24th, 1879," nor was it ever approved as fully appears on the face of the printed volume, known as the "Revised Statutes of Texas."

The subject of the enactment is not expressed in the title of the act.

In the "Revised Statutes" as circulated and received authority, immediately after section 3 and precisely where section 4 should stand if the codes set out were identical as they purport to be with the original Senate Bill No. 20, will be found the following:

"Note.—The foregoing act was presented to the Governor of Texas for his approval on the twenty-

seventh day of February, 1879, at 10 o'clock A. M. and was neither signed by him nor returned to the House in which it originated with his objections thereto, within the time prescribed by the Constitution and thereupon became a law without his signature."

(*Signed*) JOHN D. TEMPLETON,
Secretary of State.

The conclusions are, that the certificate is inadequate since it does not cover insertions made from acts of the special session; that the certificate is false because upon the very face of the volume it appears that the alleged bills set out cannot be, and are not, true copies of the originals.

That the alleged Penal Code and Code of Criminal Procedure, as printed in the "Revised Statutes," current and accepted authority—and as held valid against the petitioner, Duncan, contains relevant matter, affecting his rights and operating to his prejudice on the trial, which is palpably void and of no effect in law.

That the Penal Code and Code of Criminal Procedure set out in the "Revised Statutes of Texas," is not the "Penal Code, and Code of Criminal Procedure" supposed to have been passed February 21st, 1879.

And that the statement made in the note above quoted is obviously and necessarily untrue, since the alleged "Bill," as printed—full of amendments passed subsequent to the alleged date of presentation, February 27th, 1879, could not possibly have been presented to the Governor for his approval, as it stands, at the date given.

I insist as a necessary consequence that the entire "Penal Code and Code of Criminal Procedure" set out in the alleged "Revised Statutes" is wholly void, and cite the following in support of that claim.

"An inspection of the Legislative journals shows that Act No. 213, Michigan, 1889, was the original H. B. to regulate liquor as amended by the Senate, and that though duly certified by the presiding officers of both Houses and approved by the Governor, *it was not the bill passed by the Legislature* but is entirely different in many * * * important provisions from it; held wholly void."

45 N. W. Rep., 493., Rhode *vs.* Phelps (Mich.).

The alleged bill containing an alleged Penal Code and Code of Criminal Procedure set out in the "Revised Statutes of Texas," did not become a law then, because "it is not the bill passed by the Legislature," if a bill was passed.

EXPLANATION AND AGGRAVATION.

The explanation of these material alterations of what should be a true copy of an enrolled bill, or the "written will of the Legislature" may be found in the "introduction" to the "Revised Statutes" and is briefly this:

The alleged passage of the codes occurred on the 21st of February, 1879; the bill was designed to go *into effect* 90 days after passage. The "Penal Code and Code of Criminal Procedure" went into effect 90 days after adjournment, and the interim was largely occupied by the adoption of amendments to the original bill. The Legislature desired and attempted to incorporate such amending acts, and to make them *parts of* the original bill. This was practically to recodify the codes, for the bill, if passed, had become law. So on the 19th of April, 1879 (S. J., p. 970), an act having been pending some time, to 'provide for the printing, binding and distribution of the Revised Civil Statutes, Penal Code and Code of Criminal Pro-

cedure," an amendment was inserted in these words: "And the Governor shall appoint a codifier whose duty it shall be to select from the acts passed at the present session of the Legislature, all amendments to said codes and Revised Statutes, and insert the amended articles in the place of the original articles of the acts adopting the codes and Revised Statutes, and where new articles have been added to any chapter and title, he shall insert the new articles in their proper places, and shall note by marginal or foot references, the page of an act amending an article, or by which a new article was enacted, and where any general law passed at this session, modifies an article, but the same is not amended and re-enacted in said law, he shall leave the article of the code and Revised Statutes as adopted, but shall by marginal or foot note refer to the law so modifying the article. Said codifier shall have his work done by the time the publisher contracted with under this act is ready for the copy. He shall prepare an accurate index of each code and the Revised Statutes as amended, and shall read and revise the proof of the statutes, index, etc., as printed and shall receive for his services the same compensation as was allowed the Commissioners who revised the codes and Revised Statutes for the time he is actually engaged in the duties required of him, in no case to exceed four hundred dollars, the same to be paid upon certificate of the Governor *out of the amount appropriated for printing* the "Revised Statutes."

At a special session of that Legislature an act entitled "An Act to Amend Section Two of an Act entitled 'An Act to Provide for the Printing, Binding and Distribution of the Revised Civil Statutes, Penal Code and Code of Criminal Procedure,' approved April 26, 1879," was passed, amending the act appointing a codifier, which amendment was approved July 5, 1879, the second section of which reads as follows:

"Said Revised Civil Statutes, Penal Code and Code of Criminal Procedure, and the amendments thereto passed by the Sixteenth Legislature shall, together with the Constitution of the United States, and of this State, be published in a volume to be entitled the "Revised Statutes of Texas," and in the publication thereof, the head and marginal indices and references, titles, chapters, and articles as contained and numbered in the acts by which the same were adopted and established, together with a full and accurate index to each code and the "Revised Statutes," in the preparation of which the index to the bills reported by the commissioners appointed to revise the laws shall be conformed to the volume to be published and adopted as the index thereto, so far as the same shall be found to be correct; and the governor shall appoint a codifier whose duty it shall be to select from the acts passed at the regular session of the Sixteenth Legislature all amendments to said codes, and Revised Statutes, and insert the amended articles in the place of the original articles of the acts adopting the codes and the Revised Statutes, and when new articles have been added to any chapter and title he shall insert the new articles in their proper places, and shall note by marginal and foot references the page of an act amending an article, or by which a new article was enacted; and where any general law passed by the Sixteenth Legislature modifies an article, but the same is not amended and re-enacted in said law, he shall leave the article of the Codes and Revised Statutes as it was adopted, but shall by note refer to the law so modifying the article. He shall complete this part of his work by the time the publisher contracted with under this act is ready for the copy, and the codifier appointed under the section of which this is an amendment shall copy all amendments to said Codes and Revised Statutes passed at the present extra

session of the Sixteenth Legislature as soon as signed by the governor and insert them in their proper places and shall note all laws passed at said session that may modify but do not in terms amend an article or chapter of said Codes and Revised Statutes, indices, etc., as printed. For his services he shall receive the same compensation as was allowed the commissioner who revised the codes and Revised Statutes for the time he is necessarily engaged in the duties required of him, the same to be paid from time to time not to exceed six hundred dollars upon certificate of the Governor. That the sum of two hundred and fifty dollars, or so much thereof as may be necessary, be, and the same is hereby appropriated out of any money in the treasury not otherwise appropriated to carry this act into effect.

The printing board may in their discretion cause said volume of Revised Statutes to be electrotyped or stereotyped as may seem best, *provided* that nothing contained in the amendment shall be so construed as to in anywise interfere with the contract already made for the publication of said Revised Statutes, further than to secure the insertion of the amendments aforesaid; and provided further that the contractors for the publication thereof will insert the amended articles of the present extra session as herein provided at not exceeding fifty dollars of additional cost to the State and above the present contract price therefor." (Approved July 5, 1879).

Several fatal defects appear upon the face of those acts. (Ch. 151, Acts '79, and Ch. 20, extra session).

1. An appropriation for printing, etc., is diverted to another purpose. (Const., Art. 8, Sec. 7).

2. A second purpose different from the original purpose expressed in the title of original act is inserted. (Const., Art. 8, Sec. 35).

3. A fixed sum is to be paid out of a fund which by constitutional provision shall only be paid out under contract "to be given to the lowest responsible bidder." (Const., Art. 16, Sec. 21).

4. *Delegatus non potest delegare.*

"A code is a reduction and revision of a political community upon one or more general subjects and the enactment of this new systemized statement as one statute. An enactment of a more or less complete system of law or of procedure or of both law and procedure upon one or more general subjects. The act or process of reducing all the law upon one or more general subjects to a code."

(Anderson's Dictionary of Law).

And this by the terms of the acts quoted was precisely the duty attempted to be assigned to John N. Lyle.

He was named codifier, he was paid the same salary as the five original codifiers, and he performed, relative to the codes and subsequent acts the same duty that was performed by the first codifiers with respect to former statutes, all of which appears in the statute submitted. He completed the task, assigned in 1876 to others, whose work was not accepted or finished.

I hold that the following language taken from the act appointing Lyle, constituted him, practically, a legislator. I quote "and the governor shall appoint a codifier whose duty it shall be to select from the acts passed at the regular session of the Sixteenth Legislature all amendments to said Codes and Revised Statutes and insert the amended articles in the place of the original articles of the acts adopting the Codes and Revised Statutes, and when new articles have been added to any chapter and title, he shall insert the new articles in their proper places, and shall note by marginal or foot references the page of an act amend-

ing an article, or by which such new article was enacted, and where any general law passed by the Sixteenth Legislature modifies an article but the same is not amended and re-enacted in said law he shall leave the article of the Codes and Revised Statutes as it was adopted but shall by note refer to the law so modifying the article," and he shall "copy all amendments to said Codes and Revised Statutes passed at the present extra session of the Sixteenth Legislature * * * and insert them in their proper places and shall note all laws passed at said session that may modify, but do not in terms amend an article or chapter of said Codes and 'Revised Statutes.'"

To him is delegated the power and duty of determining what act may amend the codes, where the amending act shall be inserted; what article shall be stricken out to make place for the amendment he may select, and he shall discriminate and determine what general law "modifies," and which "amends" an article, and his selection shall take the place of the article which in his judgment is thus amended. The distinction between a "modification" and an "amendment" is relegated to Lyle, and the result of his judgment becomes law under the seal of the State, for the repealing clause of the alleged bill, recites that "all penal laws, and laws relating to Criminal Procedure in this State, that are not embraced in this act * * * be, and the same are repealed."

The court will doubtless call to mind the curious fact that this Lyle method of revision and codification is precisely that which was abrogated formally, about the time of Henry VI, when it had been found unsafe to trust the learned men with the final transcription and enrollment of statutes after the departure of the commons. It will not be forgotten that Lord Coke thought well of the Lyle method, because the learned men could draw statutes most accurately, but public

opinion and the courts have ever since that time been against the promulgation and enforcement of any law not first concurred in by all the departments of State.

One of the settled maxims in our Constitutional law is, that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain, and by the Constitutional agency alone the laws must be made until the Constitution itself is changed. (Cooley Const. Lim., Ch. 5.)

Thorne *vs.* Cramer, 15th Barb., 112.
Barto *vs.* Himrod, 8th N. Y., 483.
Santo *vs.* State, 2nd., Ioa. 165.
Geebrick *vs.* State, 5th Ioa., 491.
State *vs.* Beneke, 9 Io., 203.
State *vs.* Weir, 33 Io., 134.
Coop *vs.* Collins, 3 Mich., 343.
Parker *vs.* Comlth., 6 Penn., St. 507; 11 Penn., St., 61.
Maize *vs.* State, 4 Ind., 342.
Mesheimer *vs.* State, 11 Ind., 482.
State *vs.* Parker, 26 Vt., 362.
State *vs.* Smithers, 17 Tx., 441.
State *vs.* Copeland, 3 R. I., 33.
See particularly Vinsant *vs* Knox, 27 Ark., 267.

The authority then for the printing, binding, distribution and codification of the "Revised Statutes of Texas" including the Penal Code and Code of Criminal Procedure in controversy and for the attachment of the seal of State thereto, is to be found in the acts quoted, the first approved April 26th, 1879, and the amending act approved July 5th, 1879.

By virtue of the provisions of those alleged enactments, John N. Lyle was appointed codifier to codify, alter, arrange, amend and repeal articles, of the bill alleged to have been passed February 21st, 1879, and

which, if passed, had become a *law*, because of the failure of the Governor to sign the bill which had been presented to him for signature February 27th, 1879.

(See note of Sec. State, Sec. 3, p. 157, C. C. P.)

Lyle proceeded to make the alterations cited and to change the bill alleged to have been passed February 21st, 1879, by striking out articles, adding sections and changing penalties as will appear by reference to the petition, Revised Statutes and marginal notes cited above.

It is contended that the modifications introduced by Lyle made the codes in question, in effect, a new bill, a bill which was never introduced into the Legislature, and which was never referred or considered or passed upon, or signed by the presiding officers of the Legislature, and which was never presented to the Governor; a bill, the introduction to which shows that no ratification was ever had or contemplated or possible, and which upon its face discloses that it is not a copy of the bill of which it purports to be a true copy.

"No law shall be passed except by bill."

(Texas Constitution, section 30, article 3).

It seems to have been assumed by the Legislators that Lyle was merely to arrange and put in shape a certain amended bill, but the very truth is that he codified laws; that codification has been, and if this court rules against the prisoner, will continue to be effectual as duly enacted law.

The bill—Senate Bill No. 20,—if it passed on the 21st of February, 1879, became a law on the ninth of the subsequent March, and the independant acts afterwards passed were also laws "amending," or "modifying" or having no reference to the codes. The codifier selected, examined, and pursuant to the attempted delegated authority, determined which laws did not

effect, which laws would amend, and which laws modified the codes, and thus codified the codes.

It might be competent to reshape and amend the bill before passage, but to justify the doings of Lyle on that ground would be to concede that the bill did not pass February 21st, 1879.

When Lyle's labors were finished is not known; his bill if passed should have taken effect 90 days after approval, but the Legislature never having considered or passed his bill, and the Governor never having approved the same, there could be no date from which to compute 90 days. It could never go into effect.

There is, necessarily, no original by which to verify the work of said John N. Lyle.

The volume known as the "Revised Statutes of Texas," was not passed by Bill; it was made by John——a sourceless mass of nameless gallimaufry.

In certain articles named, Lyle extracted the penalties fixed in the original bill, and inserted different penalties enacted in a law passed at that session, and amending a law of 1876, and having no reference to the Penal Code, a clear transgression of his attempted and pretended authority.

(P. C. Arts. 152, 153 and 173.)

The law seems to be well settled as expressed by the Supreme Court of South Carolina in the following language:

"Whenever it appears that the enrolled act" (and necessarily any thing that by any legislation or consent may stand in place of an enrolled act,) "differs from the bill as passed in a substantial manner, the judiciary may declare the entire act void."

(See 2d. S. C., (N. S.,) p. 150.)

The petitioner states, (p. 9,) that chapter 151 of Act of 1879, "pursuant" to which said volume was printed,

bound, distributed and codified was not legally passed by the Legislature.

Briefly the defects are, that the bill (S. B, 345,) was not referred to a committee and reported on in the House, and the journal shows but two readings.

In the Senate the journal fails to show that the presiding officer signed the bill.

This latter point in Texas has been held to be fatal to the law; that the constitutional requirements is mandatory and must be obeyed.

State *vs.* Hunt, 22 App., p. 396.)

How could an agent not legally appointed, exercising Legislative power impossible of delegation, make valid statutes out of unconstitutional laws, and constitute the same parts of a *bill* alleged to have become a *law prior* to his alleged appointment, July 5th, and prior to the passage of the unconstitutional laws?

The failure to pass, to enroll and to provide for the printing, binding and distribution of the codes, leaves the statute law where it was before the alleged adoption of a code February 21st, 1879, with the bill submitted by the original codifiers pending, amendments attached; all a confused mass of unsettled and indefinite Legislative intentions of which the certified bill offered in evidence is a true copy.

"Nothing becomes law simply and solely because Legislators—men with Legislative powers—will that it shall be so, unless they express their determination to that effect in the mode pointed out in the instrument which vests them with power and under all the forms which that instrument rendered essential. All those rules which are of the essentials of law making, must be observed and followed, and it is matter of rules of order and routine only that may be modified by legislators."

(Cooley, Const., Lim., Ch. 6.)

The whole doctrine * * * under the American system is reduced to this: If the Legislature pursue the authority delegated to them in passing statutes, their acts are valid and conclusively binding; if they transcend that authority their acts are invalid and of no force.

(Pot. Dwar., Stat., p. 63.)

Says Chancellor Kent (Sec. 11, Com. Vol. 1, p. 240.) "To enact laws is a transcendant power, and if the body that possess it be a full and equal representation of the people, there is danger of its pressing with destructive weight upon all other parts of the machinery of Government. It has, therefore, been thought necessary, by the most skillful and most experienced artists in the science of civil polity that strong barriers should be erected for the protection and security of the other necessary powers of Government."

It has been urged that the Legislature coming from the people, should have peculiar and even greater weight in state affairs than either the judiciary or the executive.

This comes of a misapprehension of our system of Government. The people speak and put their will in a written constitution.

That instrument must be obeyed by the Legislature and judiciary alike, and the obligation, the duty of the latter to hold an unconstitutional statute void, is as imperative as it is for the Legislature to pass needed laws.

The theory that the Legislature should have exceptional weight is based upon the English unwritten constitution where the parliament speaks for the people without the restriction of a written constitution.

Restriction, conservation, the fixed deposit of power in the whole people, the avoidance of usurpation on the part of shifting majorities, is the purpose of a written constitution, and this can only be secured by enforcing a strict construction of that instrument against all departments, and no one needs that salutory restraint more than the Legislature. It makes crimes and affixes penalties. It holds the purse and pays salaries. It comes into power warm with and possibly warped by the heat of contest, and colored by the latest popular craze, and under the influence of recent pledge and promise to exacting partisans, is more likely to encroach and usurp than either of the other departments.

Says Judge Story: "That Government can scarcely be deemed to be free where the rights of property are left solely dependant upon the will of a legislative body without any restraint." (Wilkinson *vs.* Leland, 2d Pet., p. 657,) And that language has added weight where life is at stake.

THE BILL DID NOT PASS.

"Statutes must be made in conformity to written constitutions, or the act is unconstitutional and void."
(Potter's Dwarris, p. 362.)

"An unconstitutional statute is as if it had never been. Rights cannot be built up under it, contracts dependant upon it are void, it constitutes no protection to anyone acting under it, and no one can be punished for disobedience of it." (Cooley Const. Lim.)

Notwithstanding the constitutional requirement set out on a former page relative to three readings, the original bill on its face, (see also "Revised Statutes of Texas,") says that; Whereas, the fact that the session of this Legislature is restricted to a short period by the constitution, and the fact that there is a

large amount of necessary legislation demanding attention constitutes an imperative public necessity which justifies the suspension of the constitutional rule requiring the bill to be read on three several days, therefore said rule is hereby suspended.

"Whereas, the Penal Code and Code of Criminal Procedure has been printed and laid upon the desks of members, at the commencement of this session, which has afforded them ample time to read the same, and,

"Whereas, it is impossible to read the same through on three several days as contemplated by the Constitution, therefore,

RESOLVED, an imperative public necessity exists that the constitutional rule requiring bills to be read on three several days, be suspended as to the reading, but the same shall be considered on three several days."

This preamble, establishes, affirmatively, the allegation of the petition that the bill was not read on three several days, as required by the constitution, and by way of explanation sets up a Legislative inconvenience and labels it, "*Imperative Public Necessity.*"

The constitutional provision is that "full discussion" shall be had to the end that negligence, indifference, careless and hasty legislation (that is to say; avoidance of inconvenience) shall not lead to thoughtless and comfortably convenient legislation; in technical phrase, the very reason of the rule, is set up as matter in avoidance by the preamble. Because the adoption of a code was inconvenient and required unusual care and attention the constitution was trampled upon.

SECTION 4 of the bill reads:

"Be it further enacted, etc., that this act take effect from and after the expiration of ninety days from the passage of the same."

It is respectfully submitted that the plain and unmistakable contemplation of the constitution is that no bill shall have the force of a law *within ninety days* from adjournment unless there be an emergency demanding a speedier *operation of the law*, and that if the *operation of the law* be postponed for ninety days, that there then can exist *no constitutional* emergency.

And, so, with respect to the provision that "no bill shall have the force of a law until it has been read on three several days in each House, and free discussion allowed thereon; but in case of imperative public necessity * * * four-fifths of the House in which the bill may be pending may suspend *this rule*."

What rule?

Clearly the rule that no law shall go into force or *take effect* within three days, except in case of imperative public necessity, *four-fifths* may otherwise direct and provide that it *take immediate effect*.

In case of an emergency *three-fourths* of the members may put the law in force *within* ninety days; in case of imperative necessity, an *increased* majority may put the law into *effect* from and *after passage*.

The three readings are obviously designed to preserve the *rule* that a law may not go into *effect* till thoroughly discussed and understood.

This interpretation is confirmed by the history of nearly all legislation and particularly that at the time it was feard Aaron Burr would precipitate war in the southwest, and so far as Texas is concerned, it is settled by the "Legislative Manuel 1879, '80," from which I quote page 160.

"All laws, except the general appropriation act, take effect 90 days after the adjournment of the Legislature at which they were enacted; but in case of an emergency * * * the legislature may by a two-

thirds vote on the last reading, cause the law to take effect from and after its passage; and it may be passed into a law even more speedily by suspending the rule requiring it to be read on three several days, and reading the bill three times on the same day."

The State Senate, January 30th, 1879, (S. J., p. 157,) declared that by unanimous consent, a bill might be read three times by caption "and that the bill *is not passed* until it has received its three several readings.',

And Cushing in "law and practice of Legislative Assemblies" says: (p. 837,) that reading by caption with a part of the first of the bill has for many years been held a sufficient reading.

(St. J., p. 293.) It was moved that the Senate pass upon the Civil Code without amendment or discussion. The point was made and sustained that the motion was out of order because "a bill shall not have the force of a law until it has been read on three several days." These citations should have estopped the (State) Senate from agreeing to the preamble.

It is contended that the Constitution defines the emergency or necessity, *and* that the *time* of *taking effect* it is, which creates an emergency in the one case, for taking effect within ninety days, and an imperative public necessity for taking effect from and after passage in the other, and the *operation* of the law having been postponed for ninety days in this case, it was not competent for the Legislature to disobey the mandatory requirements of the Constitution, and substitute a legislative inconvenience for an imperative public necessity.

It is conceded that the Legislature is the judge of the sufficiency or urgency of an emergency or of a public necessity when either one exists, and however insufficient the same may seem, if a law shall be *called into effect* on that account, the judgment might

not be reviewable, but it is insisted that the "Rule" in question relates to the time of *taking effect*, and that postponement for ninety day concedes the absence of an "imperative public necessity."

That the action of the Legislature is subject to judicial scrutiny, if the operation of the law is deferred ninety days, may fairly be inferred from two considerations.

First. The words "no bill shall have the force of a law" are undoubtedly addressed to that department of government whose duty it is to interpose and pass upon the validity of laws, and,

Second. The fact that the Legislature is required to set out the circumstances constituting the emergency or necessity, broadly implies that the record may be inspected and passed upon by that body whose bounden duty it is to see that there is no infraction of the constitution.

SUMMARY.

The bill was not read on three several days.

There was no emergency for the operation of the law within ninety days.

There was no imperative public necessity for the operation of the law from and after its passage.

By constitutional provision, the bill *took effect* ninety days after adjournment.

The rule for three readings is mandatory.

Cooley, Const., Lim., 140.
14 Ill., 297.
25 Ill., 183.
3d Gilman (Ill.), 466.
11 Ind., 424.

THE BILL WAS NOT REFERRED TO A COMMITTEE IN THE HOUSE.

The bill consisted of four sections: The first, consisted of the Penal Code; the second, consisted of the Code of Criminal Procedure; the third, consisted of the repealing clause, and the fourth, fixed the time of taking effect.

SECTION 1. Penal Code was referred to a select committee of fifteen.

SECTION 2. Code of Criminal Procedure was referred to a different select committee of fifteen.

SECTION 3. Was not referred to a committee.

SECTION 4. Was not referred to a committee.

Each committee of fifteen reported on its own particular section. No report was made on either of the other sections. No report was made on the bill.

"Bills whether presented by a member, reported by committee or sent to the other House, proceed in the same manner through the several stages."

Cushing's law and practice of Legislative assemblies, p. 829.
Texas Con'st, Article III, Section 37.
Kent Com., 239.

"The forms prescribed for Legislative action are in the nature of limitations upon its authority. The constitutional provisions which establish them are equivalent to a declaration that the Legislative power shall be exercised under those forms and shall not be exercised under any other. A statute which *does not observe* them will be *plainly ineffectual.*"

(Story on Const., p. 176.)

The title page of that section of the Revised Statutes of Texas as set out preliminary to the codes in question, reads as follows:

THE

PENAL CODE

OF THE

STATE OF TEXAS,

PASSED BY THE

SIXTEENTH LEGISLATURE,

FEBRUARY 21. 1879,

TOOK EFFECT JULY 24, 1879.

On the 21st day of February, 1879, the last act of the Sixteenth Legislature in the alleged passage of Senate Bill No. 20, of which the Penal Code and Code of Criminal Procedure set out in "the Revised Statutes of Texas" purport to be accurate copies, was the adoption of the report of a free conference committee.

That report recommended that the Senate recede from its refusal to concur with the House amendment, striking out article 758 *a* of the Penal Code."

The matter of difference between the Houses had been variously referred to—as will be seen by reference to the journals—as article 750 *a;* article 758, and article 758 *a*.

The certified bill plainly discloses that there never was any such article as 750 *a* or 758 *a*, and the context indicates that the difference was really over article 758, and relative to that the record shows a disagreement. (House Journal, p. 380).

SECTION 758 stands now, and since that date, has stood as the law, notwithstanding the insistance of the House to strike it out.

The Senate amended by striking out certain words in Code of Criminal Procedure, article 1085; the House Journal is silent relative to that amendment. It did not agree.

But if silence is agreement, then the words should have disappeared, whereas they still stand.

In the Code of Criminal Procedure—certified bill—by manuscript amendment attached, it is written:

"ART. 688; is struck out."

"ART. 699; is struck out."

But Article 699 stands, and since February 21, 1879, has stood as the law.

ARTICLE 689 is struck out. Upon what did the Legislature agree?

It will hardly be disputed that—

"If the House fail to agree on amendments, the bill is, of course, lost."

(Cushing's Law and Practice of Legislative Assemblies, p. 883).

(Bramwell on Bills, p. 137–8).

THE BILL WAS NOT ENROLLED.

Joint rule number nine of the Sixteenth Legislature (Manual, p 173, 1879,) reads as follows:

"After a bill shall have passed both Houses, it shall be duly enrolled on paper by the enrolling clerk of the House of Representatives or of the Senate, as the bill may have originated in the one House or the other, and properly signed by the presiding officer of each House as required by the Constitution before it shall be presented to the Governor."

The record, (see record, p. 4,) as disclosed by the printed journals, shows affirmatively that enrollment was dispensed with by the adoption of the following joint or concurrent resolution :

"Whereas, it will incur unnecessary and enormous outlay of both time and money to have enrolled the *Civil and Criminal* Codes passed by the Legislature as required by joint rule 9, therefore,

Be it resolved, the Senate concurring that said joint rule be suspended as far as relates to said codes, and that an enrollment of the amendments made thereto properly arranged, shall be considered a proper enrollment of said codes."

(Legislative Journals, February 21st, 1879.)

Notwithstanding the constitutional provision—Art. IV, Sec. 15, that resolution was not passed according to "all the rules, provisions and limitations" that apply to a bill. And the resolution was not presented to the Governor, nor was it approved by him.

3d Gillman, (Ill.) p. 466.

"This form of legislation is recognized in most of our constitutions in which * * it is put upon the same footing with bills. In Congress a joint resolution * * is regarded as a bill."

(Cush. Law and P. Leg. Ass., p. 930.)

But if it may be construed to indicate anything further than the establishment of the allegation, that the bill was not enrolled, it can only be interpreted to mean that the amendments should take the place of and become substitutes for the codes, which would seem to be a conclusion so unreasonable as to destroy the resolution for any purpose. It is not capable of an intelligible construction. I have assumed that the court will look to the Legislative Journals in search of information and cite the following in support of that assumption.

In Gardner *vs.* Collector, 6 Wall., 505, Mr. Justice Miller used this language:

"We are of opinion therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute * * * the Judges who are called upon to decide it have a right to resort to any source of information, which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first that which in its nature is most appropriate unless the positive law has enacted a different rule."

See also—

14 Ill., 297.
13 Mch., 481.
17 Ill., 151.
43 Ill., 77.
19 Ill., 324.
22 Tx. App.,396

In *ex parte* Farley, 40th Fed. report, the learned Judge, discussing the power of the court in question to indict, looked into the Congressional Record even and quoted therefrom the language of the Chairman of the Judiciary Committee to establish the fact that a grand jury was not contemplated in the organization of the court at Muskogee, Indian Territory.

See also—

61 Am. Dec., 348., People *vs.* Starne; Pot. Dwarris, p. 362–7.
13th Fed. Rep., 722.
18th Fed., 385.
94 U. S., p. 261.
105 U. S., p. 670.

Chancellor Kent says "statute law," is "the express written will of the Legislature rendered authentic by certain prescribed forms and solemnities."

(Pot. Dwar. Stat., p. 37).

If it be true that a statute is "the written will of the Legislature, solemnly expressed according to the forms necessary to constitute it the law of the State,' then the enrolled bill is the very embodiment of the intent and "will of the Legislature," and if there be no enrolled bill, there is no "written will"—no statute.

It was competent, doubtless, for the Legislature to have substituted a printed bill for an enrollment or for a written bill, but the bill, or the substitute—the written will—must be definite, free from interlineation, confusing marginal note or doubt as to conflicting paragraphs, as an enrollment would be; and it must be *substituted* by the Legislature whether written or printed.

In the case at bar the printed bill submitted by the codifiers was patched, obscured and confused by written amendments which were never engrossed, or enrolled and that patched, obscured, and amended bill was left by the Legislature without correction, enrollment or substitute, so that the "written will" of that Legislature is confused and incapable of interpretation or verification.

The merest glance at the alleged bill set out in the "Revised Statutes" when compared with the certified bill as supposed to have been passed, and as assumed to be the original of which the "Penal Code, and Code of Criminal Procedure" in said statutes, purport to be copies, discloses the widest and most material variances.

The alleged statute and the original bill, of which it should be a counterpart, upon inspection are seen to be almost as widely variant as the statutes of different states, instances striking and numerous, are cited above.

Over and over again it has been decided in Texas,

and elsewhere and is indisputably the law, that the certified copy of the enrolled bill is the best evidence of the law.

But there is no enrolled bill; no original of which to make a copy, the record *so states* in the joint resolution, and that is confirmed by the duties assigned to Lyle, and emphasized by the condition of the certified bill. A verification of the "Revised Statutes" would be a certified copy of the intent, purpose and judgment of John N. Lyle, or a photograph of that codifier's mind; the "Penal Code and Code of Criminal Procedure" are incapable of verification.

The first statutes—the ten commandments—were graven on tables of stone by the hand of the Almighty. Even Moses, the great law giver, was not trusted as was Lyle. The twelve tables were exposed in the public forum at Rome, and of the Magna Charta, there exists yet an original in the British Museum. The Texas "Revised Statutes," are probably the only ones in history *never capable of verification.*

NEITHER HOUSE OF THAT LEGISLATURE KEPT A JOURNAL.

The constitutional requirement to keep a journal is mandatory, and the legislative manual of the Sixteenth Legislature (1879, p. 147), reads: "Some judges have been of opinion that the journals * * * are no records, but only remembrances.

"But this is not law. For the Lord's have power of judicature, the Commons have power of judicature, and both Houses together have power of judicature, and the book of the clerk of the House of Commons is a record as is affirmed by act of parliament, and every member of the House of Commons hath a judicial place. * * * Being a record, every one may see and publish them."

It was held in the 18th Federal Rep., p. 385, that in case of conflict between the written and printed journals, the written record would prevail.

That a written record should have been kept by the Sixteenth Legislature of Texas, and that the State, not less than the prisoner, should insist upon the production of that record is clear for obvious reasons.

The printed journals disclose an unmistakable disagreement at the alleged adoption of Senate Bill No. 20.

Possibly the printed journals are incorrect; if the written journal should prove that the printed journals are incorrect, and that the Houses did agree, the State might be justified in enforcing the alleged judgment here in question.

Without such a written journal overruling the printed journals, my contention is, that the state would, in the execution of Duncan, commit a deliberate act fatal to life with full knowledge of the lack of sufficient legislative enactment. or legal warrant—a crime unsurpassed by that charged to the petitioner.

But the citizen is entitled to the protection of that constitution which he and his fellow citizens have adopted for their common good. The people have said that the Legislature "shall keep a journal" and now that a question has arisen with his life at stake, the written record which could solve, and which was designed to solve all doubts arising relative to legislative proceedings, cannot be produced; with a printed journal showing conclusively a *disagreement* on the adoption of the bill that condemns him, it would seem iniquitous, to execute one presumed to be innocent and who is entitled to the benefit of every reasonable doubt.

The context raises a strong presumption that a disagreement existed relative to Article 758, and the

prisoner insists that he is entitled to a certified copy of that constitutional record which would confirm and irrevocably establish that disagreement.

The written journals of which the printed should be copies, and by which the printed copies could be verified, would definitely and constitutionally determine the rights of both parties.

The state should demand the record and insist, not less than the prisoner, for, "the office of the journal is to record the proceedings of the House and *authenticate* the same."

(Cooley, Const. Lim., ch. 6.)
(14 Ill., 297.)
18 Fed. Rep., 385.

The State should not execute till she shall have established the agreement of the Houses and the adoption of the bill by constitutional methods, and the prisoner is entitled to that record to make certain and indisputable the fact, that the bill was not adopted.

The original bill, if passed, did not on July 24th, become, and is not now, an effective law.

The Legislature seems to have correctly concluded that the original codification, as a statute, was wholly destroyed. That body seems to have correctly assumed that the original codification, the amending laws thereto, and laws conflicting therewith, should be recodified—hence the attempted appointment of Lyle. But the method adopted was a mistake and the attempt to codify was abortive.

The purpose and intent of the Legislature in the enactment of the new codes (and the attempted effectuation of that purpose and intent in the appointment of Lyle) is expressed in these words, providing for the appointment of the *original codifiers*, to wit: "To make a complete revision and digest of the laws of the State of Texas. * * * Revise all the general

statutes * * * and report * * * which statutes in their opinion, ought, and which ought not to remain in force, * * * and suggest the mode in which they can be reconciled, supplied and amended." (Ch. 6, Laws of 1876, Sec. I.) The work of the original codifiers having been tattered and torn by alterations, it became necessary that the same work should be done over, but Lyle was not to suggest a mode of amending.

He was simply to *amend.*

Lyle was given power to determine between an amendment and a modification, and to amend and strike out portions of the law of February 21, pursuant to his own judgment, in these words: "He shall select * * * all amendments, and insert the amended articles in place of the original articles * * * and where any general law * * * modifies an article, but the same is not amended * * * he shall leave the article of the code * * * as it was adopted."

Laws 1879, Ch. 151, Sec. II.

And by amendment to that act in these words:

"The Governor shall appoint a codifier whose duty it shall be to select * * * all amendments * * * and insert the amended articles in place of the original articles * * * and where any general law * * * modifies an article, but the same is not amended * * * he shall leave the article of the codes * * * as it was adopted, and shall by note, refer to the law so modifying the article." * * * And the codifier shall note all laws passed at said, (the extra) session that may modify, but does not in terms amend an article or chapter of said code."

(Laws 1879, extra session, Ch. 20, Sec. II.)

Pursuant to his delegated (?) authority, Lyle altered the bill to comply in his judgment with amendments

subsequently passed. (See bill, Revised Statutes and marginal references.)

It is submitted that the Legislature could not amend *a bill* after it left that body and remained in the hands of the Governor for action, and necessarily could not authorize any agent to do what the appointing power could not do.

Nevertheless, inspection proves that Lyle made certain insertions from acts passed between February 21, and March 9, parts of the "Revised Statutes," covering the time it was in the hands of the Governor.

An instance of such amendment of the bill, if they could amend the bill in the Governor's hands by Lyle, occurs relative to the judicial district in which was located the County of Maverick where the defendant is alleged to have been convicted. In Senate Bill No. 20, that district (the 24th), consisted of 13 counties; as printed in the Revised Statutes, it consisted of 12 counties. On page 12 of the Revised Statutes at the 25th District, will be found a reference to Ch. 24, p. 22, acts 79. Inspection of that shows that the County of Lasalle (one of those constituting the 24 District) was attached to the 25 District by an act approved March 1st, 1879, while Senate Bill 20 lay in the Governor's hands. But the Revised Statutes, Lyle's codification, makes that change appear as if originally enacted in Senate Bill 20, on the 21st of February, 1879.

But later, conflicting general laws would prevail and to that extent repeal the bill The general laws would be valid, but not *as part* of the bill containing the codes; between February 21st, the date of the alleged passage, and March 9, when, if ever, it became a law, that bill was in a chrysalis state, neither worm nor butterfly; it was not pending before the Legislature for amendment, nor had it become a law.

Between the 21st of February, 1879, and July 10th,

when the special session adjourned, many separate enactments (some of which are set out above, and most of which are cited by marginal reference, in P. C. and C. C. P.), amendatory of, and conflicting with the original bill, were adopted, totally destroying the Revised Penal Code, and Code of Criminal Procedure *as a bill* originally adopted, if adopted. The original bill had necessarily, therefore, ceased to exist *as an entire statute* before July 24th, the time of the taking effect; as an entirety, it was abandoned.

The unrepealed portions of that bill, if adopted, would be valid law.

What portions? That is the question.

An incompetent agent; a power unknown to the law making department, as codifier had determined what was repealed and what was not; what was, and what should be, the statute law of Texas, from and after July 24th, 1879.

I contend that a Legislature only can say what shall be law; that only a court can determine what is the law.

The Legislature can make law; the courts can construe law; a delegate of either department can do nothing; but Lyle exercised both judicial and Legislative functions.

The Statute Law of Texas, then, is yet to be sifted out and settled by the courts, or codified by the Legislature, the original bill, (if passed,) having ceased to exist as a statute by reason of numerous acts amending, conflicting with, and repealing portions of the same, *while its operation was held in abeyance.*

The Statute Law of Texas is yet to be determined by competent authority.

That which stands as the Statute Law of Texas is indisputably the handiwork of one who performed his task in the absence of, and necessarily after the ad-

journment of the Legislature, but, a statute by the best English definition was: "Such acts as are made by the King's majesty, by and with the advice and consent of the Lord's spiritual and temporal and commons *in parliament assembled.*" (Pot. Dwar, p. 43)—*not after adjournment.*

The volume known as the "Revised Statutes of Texas," has no legal existence and laws amendatory thereof, are null and void.

On page nine of the record, and on a prior page of this brief, it is set up, that chapter 151 of the "Revised Statutes" pursuant "to which Lyle was appointed and that volume codified, printed, bound and distributed, and pursuant to the provisions of which that volume assumes to appear, "by authority of the State of Texas," and by force and virtue of which that volume is entitled, the "Revised Statutes of Texas," failed of enactment for reasons set out in the petition.

It follows as night follows day, that enactments amending the "Revised Statutes," (a void volume if the allegations alluded to be true,) are void and of no effect.

(See the Borrowdale, 39 Fed. Rep., p. 376.)

On page ninety-one of the laws of 1885, chapter 100, the following is found and is now, and at the trial of the applicant was recognized as the law of Texas, to wit:

An act to amend article 636, chapter 3, title 8 of section 2 of an act, entitled, "An Act to adopt and establish a Penal Code and Code of Criminal Procedure for the State of Texas."

Be it enacted by the Legislature of Texas, that article 636, chapter 3, title 8 of section 2 of an act entitled "An Act to adopt and establish a Penal Code and Code of Criminal Procedure for the State of Texas," be so amended as to read as follows:

"ARTICLE 636. (Here is set out the article as it appears in the "Revised Statutes," except the 13th subdivision, which is amended to read as follows:)

13. That from hearsay or otherwise there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict. For the purpose of ascertaining whether this cause of challenge exists, the juror shall first be asked whether in his opinion the conclusion so established will influence his verdict. If he answer in the affirmative he shall be discharged; if he answer in the negative he shall be further examined by the court or under its sanction as to how his conclusion was formed and the extent to which it will affect his action, and if it appears to have been formed by reading newspaper accounts, communications, statements, or reports, or from mere rumor or hearsay, and the juror states on oath that he feels able, notwithstanding such opinion to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may in its discretion admit him as competent to serve in such case, but if the court in its discretion is not satisfied that he is impartial, the juror shall be discharged."

Prior to the alleged adoption of the codes of 1879, which the act of 1885 attempts to amend, the causes for challenge to a juror read as follows:

"The following are also causes for challenge to a juror:"

1. That he is related by consanguinity or affinity to the defendant or his master or guardian. 2. That he is related by consanguinity or affinity to the person injured by the commission of the offence or to the private prosecutor if there be one. 3. That he served on the grand jury which found the indict-

ment. 4. That he served on the petit jury in a former trial of the same cause. 5. That he has a bias or prejudice in favor or against the defendant. 6. That from hearsay or otherwise there is established in the mind of the juror, such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding the verdict. For the purpose of ascertaining whether the last cause of challenge exists, the juror shall be first asked whether in his opinion the conclusion so established will influence his verdict. If he shall answer in the affirmative, he shall be discharged. If he answer in the negative, he shall be further examined by the court or under its direction as to how his conclusion was formed and the extent to which it will affect his action and if the court is not satisfied from such examination that he is impartial, the juror shall be discharged. 7. That the juror has conscientious scruples in regard to the infliction of the punishments of death for crime."

(Paschal's Digest, Art. 3041).

It is claimed that the amendment set out above as enacted in 1885, amending the "Revised Statutes" and thereby supplanting in part the provision last quoted, did affect the rights and operate to the prejudice of the petitioner, though void and of no effect, for one or both of the following reasons:

First. The "Revised Statutes" as already disclosed, had no legal existence or authority in law and no amendment thereto could be valid.

Second. If the "Revised Statutes" had any legal existence or authority in law, the amending act was void for want of a subject of Legislation expressed in the title.

The alleged Penal Code altered and made a false pretense by the codifier.

On page 23 of this brief is set out an act, (App.

Apl. 19, 1879,) entitled, "An Act to amend section sixteen of an act regulating elections, approved August 23, 1876."

Attention is first called to the fact that that act in no way referred to or in terms amended the Revised Statutes, and that therefore any further allusion to it than a mere marginal reference by Lyle in the Revised Statutes, would be a transgression of the attempted authority supposed to have been delegated to or conferred upon that alleged codifier according to the provisions of chapter 151, laws of 1879.

Second. It is necessarily true that if the Revised Statutes were really enacted, or if by any sufferance, public policy or judgment of any court, it might be held that the Revised Statutes are and have been valid law, the laws of 1876, together with all laws prior to 1879, were repealed and extinguished since the repealing clause reads: "That all penal laws and all laws relating to Criminal Procedure in this State, that *are not embraced in this act* * * * be and the same are hereby repealed," and because the Constitution contemplated that that Legislature should adopt a digest and revision of the statute in these words: "The first session of the Legislature under this Constitution shall provide for revising, digesting and publishing the laws, civil and criminal."

It is clearly the intention of the Constitution, that the laws—*all* the laws, should for convenience, accuracy and certainty, be embodied in the codes or digest and revision. The laws of 1876 then were extinguished by operation of the repealing clause noted, and with it inevitably would and did disappear, the amendment set out, and thus it could not become a part of the "Revised Statutes."

But the Act of April 19, under discussion is absolutely void intrinsically, containing as it does con-

flicting and repugnant penalties in one section, as follows, to-wit:

"And any presiding officer, judge or clerk of election who shall violate any of the provisions of this section shall be deemed guilty of a *felony* * * * and shall be punished by imprisonment * * * not less than one nor more than two years."

(This penalty will be found inserted in Art. 152, P. C. Revised Statutes, in place of the penalty supposed to have been enacted in the Senate Bill No. 20.)

"And any officer, judge or clerk * * * who shall divulge, etc., * * * shall be deemed guilty of a *misdemeanor* * * * and fined not less than $100 nor more than $500."

(This penalty will be found inserted in Art. 153, P. C. Revised Statutes, in lieu of the penalty supposed to have been enacted in Senate Bill No. 20.)

"Any person who shall deposit any ballot except as provided in this section, or shall deposit two or more tickets folded together * * * shall be deemed guilty of a misdemeanor * * * and fined not more than $100."

(This penalty will be found inserted in a note to Art. 166, P. C. Revised Statutes.)

"The violation of *any* of the provisions of this section shall be deemed a misdemeanor, and *any person* convicted shall be fined not less than $50 nor more than $500."

(This penalty will be found inserted in Art. 173, P. C. Revised Statutes, in place of the penalty supposed to have been enacted in Senate Bill No. 20.)

The mischievous nature of Lyle's work is made

glaringly manifest by the separation of the four penalties quoted.

The most conscientious, learned and painstaking court would not hesitate to inflict the penalties as distributed—their invalidity is not apparent. The fact indisputable, that Lyle therein legislated would be unsuspected; that he construed statutes would be undreamed of.

Any court in the land that accepted the "Revised Statutes of Texas," for what they assume to be, would be led into the commission of the gravest judicial errors; the volume so entitled is a duly certified false pretense.

The alleged codes are further a false pretense.

Because upon the face of the volume known as the "Revised Statutes," it appears that the so-called law set out in that volume, is not a law passed by bill, but is, on the contrary, a codification of a certain alleged bill (of which it falsely purports to be a copy) and certain subsequent acts, amending, modifying, and conflicting with the same.

Because while purporting to take effect July 24, 1879, many constituent parts thereof took effect by their own terms at other dates, to-wit:

On page 70, laws of 1879, will be found an act amending Article 794 of the Code of Criminal Procedure. The article as amended will be found in that code set out in place of the original article supposed to have been enacted in Senate Bill, 20, but the amendment was "approved March 27, A. D. 1879," and "*takes effect from and after passage.*"

On page 15 of the alleged Penal Code ("Revised Statutes") will be found what is called a "supplement."

On page 5 of the acts of the extra session of the Sixteenth Legislature will be found an act "*approved*

July 2, 1879, and which "*takes effect from and after passage.*"

A comparison of the act with the "supplement" discloses that the "supplement" is the codifier's construction of the Act of July 2, '79, as he deems it to supplement the legislation supposed to have been enacted in Senate Bill No. 20, and that he made the same part of the alleged Penal Code, which by pretense of the title page to the Penal Code and Code of Criminal Procedure, is represented as having gone into effect July 24, 1879.

Another portion of that same act of July 2—to go into effect from and after passage—will be found as a "supplement" to chapter four of the alleged "Revised Civil Statutes" on page 700, and by reference to section 22, page 720, of the alleged Civil Bill it will be seen that *that* alleged law was supposed to have gone into effect "*at twelve o'clock meridian, on the first day of September, Anno Domino* one thousand eight hundred and seventy-nine."

The Act of July 2d was thus made to affect the judicial system and operate to the prejudice of defendant's at three several dates.

(Other instances, of which there are several, would make cumulative argument).

The alleged codes are further a false pretense, because if they constitute a law passed by the Sixteenth Legislature (Regular and Special Session) it could only take effect constitutionally, ninety days from the last day of the last session acting upon it; that is to say, ninety days from July 10, the day of adjournment of the Special Session, which would be October 10, 1879.

Because it could not appear "by authority" or *take effect* till duly authenticated, and the certificate bears date September 6th, 1879. (How could the Penal Code go into effect before it had *authentic existence?*

Because, if it be held that the P. C. and C. C. P., is valid law as made and codified by Lyle, then the law should take effect 90 days from the date of the completion of his delegated task which date being unknown to the record, would defeat the operation of the law. It could not take effect July 24, 1879.

The alleged Penal Code and Code of Criminal Procedure is further and conspicuously a false pretense.

Because it purports to be a bill passed by the 16th Legislature of Texas at the regular session, February 21st, 1879.

The petitioner further insists that the clerk who issued the writ, the sheriff who arrested him, the judge who presided at his alleged trial, and the sheriff who now holds him in prison are not officers of the State of Texas, duly elected.

As will be seen on page 254 of the alleged Revised Statutes after Article 1697, a note inserted by Lyle, not found in Senate Bill No. 20 or the certified copy thereof, makes an extract from the Act of April 19, 1879, set out above and demonstrated to be void, a necessary and important part of the election law of said State. That paragraph reads as follows:

Note.—Chap. 112, Acts 1879, provides that "all ballots shall be written or printed on plain white paper, without any picture, sign, vignette, device or stamp or mark, except the writing or printing in black ink or black pencil of the names of the candidates and the several offices to be filled, and except the name of the political party whose candidates are on the ticket; *provided*, such ballots may be written or printed on plain white fool's-cap, legal-cap or letter-paper; provided that all ballots containing the name of any candidate pasted over the name of any other candidate shall not be counted for such candidate whose name is so

pasted, and any ticket not in conformity with the above, shall not be counted."

(See appendix for act in full, L.")

(An inspection shows the extract to be incorrect.) But the election law was further amended as follows in April 1881 (laws of 1881, p. 97), by an act entitled "an Act to amend title 34 of the Revised Civil Statutes of the State of Texas, by adding Articles 1665 *a* and 1665 *b* and to amend Articles 1689 and 1702 of the election laws of the State of Texas and to provide for creating precincts in unorganized counties.

SECTION 1. Be it enacted by the Legislature of the State of Texas. That title 34 of the Revised Civil Statutes of the State of Texas, be amended by adding Articles 1665 *a* and 1665 *b* and by amending Articles 1689 and 1702, so that the same shall read as follows:

ARTICLE 1665 *a*. Each unorganized County in the State of Texas, shall constitute an election precinct, and the Commissioners Court of a County to which an unorganized County is attached for judicial purposes, shall by an order duly spread on the minutes of the Commissioners Court, designate one place within each unorganized County, at which all elections in such unorganized County shall be held.

ARTICLE 1665 *b*. It shall be the duty of the Commissioners Court to which any unorganized County is attached for judicial purposes to appoint some suitable person in each of such unorganized Counties to serve as a presiding officer of elections in said unorganized County, which appointment shall be made in the same manner as in the appointment of the presiding officers in the election precincts in organized Counties."

ARTICLE 1689. All voters in any County shall vote in the election precinct in which they reside.

ARTICLE 1702. Immediately after counting the votes by the managers of election, the presiding officer shall

place all the ballots voted together with the poll list, and one tally list into a wooden or metallic box, and shall securely fasten the box with nails, screws or locks, and he shall within ten days after election, Sundays and the days of election excluded, deliver said box to the clerk of the County Court of his County or to the County to which the unorganized County is attached for judicial purposes, whose duty it shall be to keep the same securely, and in the event of any contest growing out of elections within one year thereafter, he shall deliver said ballot-box to any competent officer having a process therefor, from any tribunal or authority authorized by law to demand such ballot-box, provided that all questions arising at any election board shall be settled and determined by the presiding officer and the judges, anything in any law to the contrary notwithstanding—

SEC. 2. The near approach of the close of the session of the Legislature creates an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and it is so suspended.

Approved April 4, A. D. 1881.

"*Takes effect ninety days after adjournment.*"

(See acts 1881, p. 97).

It is contended that that act is void;

Because more than one subject of legislation is embodied in the act;

Because it purports to amend a void volume—a book that does not appear by authority of the State of Texas; and—

Because upon its face it discloses that the bill was not read on three several days, there being no emergency set up for the operation of the law from and after passage or within three days.

Later, on April 2d, 1883, the election laws were fur-

ther amended as follows: by an act entitled—

"An Act to amend Articles 1667 and 1693 of the Revised Statutes."

SEC. 1. Be it enacted by the Legislature of the State of Texas:

That Article 1667 of the Revised Statutes be so amended as to read as follows:

ARTICLE 1667. At the first regular or called session of the Commissioner's court in each county in each year, or as soon thereafter as practicable, said court shall select and appoint some suitable and competent person in each election precinct, and said appointment shall be noted upon the minutes of the court, provided that the Commissioner's court of any county may have the power, when they deem advisable, to appoint two presiding officers for each election precinct, one of whom shall be the presiding officer at the ballot-box used for the deposit of ballots cast for electors for President and Vice-President of the United States and members of Congress of the United States and the other presiding officer at the ballot-box used for the deposit of ballots cast for State, District and County officers.

SEC. 2. That article 1693 of the Revised Statutes be so amended as to read as follows:

ARTICLE 1693. In all elections by the people, the vote shall be by ballot, which ballot may be either written or printed, or written in part, or printed in part, which ballot shall be deposited in the ballot-box as hereinafter provided; provided, however, that whenever the Commissioner's Court of any County shall have made an order appointing two presiding officers in each election precinct as provided in Article 1667, then one of said presiding officers shall be designated as the presiding officer to receive and count and return as provided by law, the ballots for electors for President and

Vice-President of the United States, and members of Congress of the United States and the other of said presiding officers shall be designated as the officer to receive, count and return the ballots cast for State, District and County officers; each to be provided with a metallic or wooden box to be used for the purpose; and all laws in force pertaining to the holding of elections and making returns thereof, shall apply alike to managers of the election at each of said ballot-boxes.

SEC. 3. The near approach of the close of the present session of the Legislature, and the probability that this bill will not become a law, creates an imperative public necessity for dispensing with the constitutional rule requiring this bill to be read on three several days in each House of the Legislature, and it is so enacted.

Approved April 2d, 1883.

Takes effect ninety days after adjournment.

(See Acts 1883, p. 39.)

It is contended that that act is void; because no subject of Legislation is expressed in the title thereof; because it purports to amend a volume which is void, and which has no existence by authority of the State of Texas, and because it appears upon the face of the Act, that it was not read on three several days, there being no emergency alleged for the operation of the law from and after passage or within three days.

Later, an attempt was made to amend the election laws of said State by the following entitled "An Act to amend Title 34, Chapter 1 of the Revised Civil Statutes."

"SECTION 1. Be it enacted by the Legislature of the State of Texas, that Article 1664 of the above recited title and chapter, be so amended as to hereafter read as follows:

ARTICLE 1664. In each incorporated city, town or village, each ward shall constitute an election precinct. *Provided*, that the Commissioner's Court of the several Counties, may and it shall be their duty to divide any ward of any city or town into as many election precincts as they may deem proper, *and provided further:* That towns and villages incorporated in accordance with chapter 11 of title 17, shall not necessarily constitute a separate election precinct, except in elections pertaining solely to the affairs of said towns and villages.

SEC. 2. The fact that the Commissioner's Courts of the several Counties of the State will at the February Term, 1889, rearrange the voting precincts of the different Counties for the ensuing year, creates an emergency which requires the suspension of the Constitutional rule requiring bills to be read on three several days, and that this act take effect and be in force from and after its passage, and it is so enacted.

(NOTE.—The foregoing act originated in the Senate and passed the same by a vote of 27 yeas and 1 nay, and passed the House by a vote of 76 yeas, no nays.)

Approved February 12, 18 9."

(See acts of 1889, p. 10.)

It is contended that that act is void—

Because no subject is expressed in the title thereof, and—

Because it purports to amend a void volume—an alleged law which does not appear by authority of the State of Texas.

ARTICLE 1659 of the alleged Revised Statutes, reads as follows:

The next general election in the State of Texas shall be held on the first Tuesday, next, after the first Monday in November, A. D. 1880, and general elections shall be held every two years thereafter, at such places and under such regulations as may be prescribed by law.

The petitioner contends that all the supposed laws set out are invalid.

It will not be denied that the elections in the State of Texas, during the past eleven years have been conducted pursuant to the provisions and modes of procedure set out in the alleged laws quoted.

It will be conceded by the State that the officers concerned in the arrest, trial and detention of the petitioner, act and have only acted by reason of authority supposed to reside in them by virtue of election pursuant to the methods and regulations disclosed in the supposed laws quoted, and therefore, the prisoner concludes that his arrest, alleged trial and conviction, and imprisonment are illegal; and that therefore, sustained by the other reasons before assigned, he should be discharged. His hope lies in a courageous judiciary.

"It is not constitutions that make liberty. Liberty is not secured by certain words written on parchment. The parchment with its ink, may be eaten by worms, it may be torn to shreds by a daring hand, but if an independent judiciary shall pronounce the solemn expression of its true spirit, as the law of the Nation or of the State, the living words of their judicial interpretation shall be perpetuated."

(Lieber's Political Hermeneuties, Chap. 6, Sec. 10.)

The error therefore to be assigned and which is here assigned is: the court below should have heard the petition and granted the prayer of the same instead of denying it.

And the reasons for this having been fully given, a reversal of the decision of the court below is respectfully asked.

THEODORE J. MCMINN,
Of Counsel for Appellant.

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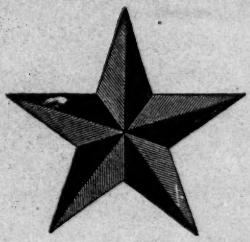

No. 1174.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

DICK DUNCAN, Appellant,

v.

T. P. McCALL, Sheriff of Bexar County, Texas, Appellee.

Apeal from U. S. Circuit Court, Western District of Texas.

BRIEF FOR APPELLEE.

By J. S. HOGG, Attorney General of Texas, and R. H. HARRISON, Assistant, Counsel for Appellee.

No. 1174.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

DICK DUNCAN, APPELLANT,

v.

T. P. McCALL, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, ON HABEAS CORPUS.

STATEMENT OF THE NATURE AND RESULT OF SUIT.

This case is an appeal from a judgment of the Circuit Court of the United States for the Western District of Texas, denying to appellant a writ of habeas corpus. Appellant Dick Duncan was indicted by the grand jury of Maverick County, Texas, for the crime of murder committed within the body of said county. He was arrested, arraigned upon said charge, and tried in the District Court of said county and State, and found guilty as charged in the indictment, and his punishment assessed at death, whereupon said court entered judgment and sentence accordingly, from which said Duncan appealed to the Court of Appeals of the State of Texas, where the case is now pending. After said judgment

No. 1174.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

DICK DUNCAN, APPELLANT,

v.

T. P. McCALL, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, ON HABEAS CORPUS.

STATEMENT OF THE NATURE AND RESULT OF SUIT.

This case is an appeal from a judgment of the Circuit Court of the United States for the Western District of Texas, denying to appellant a writ of habeas corpus. Appellant Dick Duncan was indicted by the grand jury of Maverick County, Texas, for the crime of murder committed within the body of said county. He was arrested, arraigned upon said charge, and tried in the District Court of said county and State, and found guilty as charged in the indictment, and his punishment assessed at death, whereupon said court entered judgment and sentence accordingly, from which said Duncan appealed to the Court of Appeals of the State of Texas, where the case is now pending. After said judgment

of conviction and sentence, and while the same was pending in said Court of Appeals of Texas, to-wit, on or about the tenth day of April, 1890, said Duncan filed in the United States Circuit Court for the Western District of Texas his application for writ of habeas corpus to be relieved from the force and effect of said judgment and the custody of appellee, a State officer, holding him under said judgment and sentence, upon the ground substantially that he was deprived of his liberty and about to be deprived of his life in violation of the Constitution of the United States. Appellee answered by plea to the jurisdiction of the court, and by general and special exceptions to the sufficiency of appellant's application.

Said United States Circuit Court, at a regular term thereof, to-wit, on May 14, 1890, on hearing said application sustained appellee's plea and exceptions, dismissed the cause, and denied the writ, from which appellant appealed and brings the case to this court for revision. (Record pp 1–22)

APPELLEE'S FIRST COUNTER-PROPOSITION.

Where a State court has jurisdiction of the person and offense the writ of habeas corpus cannot be invoked in a Federal court to, revise the judgment rendered in the case by the State court. The remedy, if any, is by writ of error to the State court of last resort from the United States Supreme Court.

Statement.

On the 23rd day of May, 1889, by indictment duly found, presented to and filed in the District Court of Maverick County, Texas, by the grand jury in and for

said county, appellant Dick Duncan was charged with the crime of murder, alleged to have been committed within the body of said county. He was arrested upon said charge, and on the 7th day of December, 1889, at a regular term of said District Court, he was brought into said court, a jury was duly empaneled to try the cause, and he was arraigned before said court and said jury upon said charge, was tried and by the jury found guilty of the offense as charged in the indictment, and his punishment assessed at death. Said court thereupon entered its judgment and sentence accordingly

Said Duncan excepted, and gave notice of appeal to the Court of Appeals of the State of Texas, where the case is now pending.

Afterward, on to-wit, the 10th day of April, 1890, and while said cause was still pending in said Court of Appeals of Texas, said Duncan presented his application to the United States Circuit Court for the Western District of Texas for a writ of habeas corpus to be relieved from the force and effect of said judgment and the custody of appellee, a State officer, who held said Duncan by authority of said judgment of conviction and sentence and the order of the said District Court of said Maverick County. The ground stated for the writ in said application was substantially that said Duncan was restrained of his liberty and was about to be deprived of his life in violation of the Constitution of the United States. The facts constituting the alleged unlawful restraint are set forth at length in said application, to which reference is here made for particulars.

They are in substance, that the statute against murder under which he was tried was never legally enacted by the Legislature of Texas in accordance with the requirements of the Constitution of Texas. That there

was a statute of the State against murder whose penalty was death, but it was not the statute administered in his trial.

Said Circuit Court upon a hearing of said application denied the writ and remanded said Duncan to the custody of appellee. (Record, pp. 1-10+11-23)

Authorities.

Texas Constitution, art. 5, sec. 8; Act of the Legislature of Texas, of date March 25, 1887, General Laws 1887, p. 46.

Ex Parte Parks, 93 U. S., 18.

Ex Parte Siebold, 100 U. S., 375.

Ex Parte Royal, 117 U. S., 245; Id., 255.

Ex Parte Fonda, 117 U. S., 518.

Remarks.

The rule that the writ of habeas corpus can not be employed to perform the office of a writ of error so as to revise the judgment of a court of competent jurisdiction, is well settled by numerous authorities, both State and Federal. It is equally well settled that this court will take judicial notice of the provisions of the Constitution and general laws of a State.

The first inquiry, therefore, under this proposition is, Was the District Court of Maverick County, Texas, a court of competent jurisdiction to try the offense of murder, and did it acquire jurisdiction of the person of appellant as well as of the offense of which he was charged?

The Constitution of the State of Texas, by section 8, article 5, fixes and prescribes the jurisdiction of the District Courts of the State; and among other things it gives to the District Courts general jurisdiction to try

and determine all criminal cases of the grade of felony.

The District Court of Maverick County was created and organized by general act of the Legislature of the State of Texas, of date March 25, 1887. The application of Dick Duncan for the writ of habeas corpus raises no question as to the validity and binding force of the present Constitution of the State of Texas, but every right he demands therein is founded upon said Constitution. Neither does the application raise any objection to the validity of the act organizing and creating the District Court of Maverick County, Texas. This being true, when the Legislature of Texas created the District Court of Maverick County the constitutional jurisdiction of District Courts at once attached to and vested in said court. Hence we have a court duly organized and created in accordance with law, with jurisdiction full and ample to try the offense with which appellant is charged.

Now, then, having a court of competent jurisdiction, duly created and organized, the next inquiry is, Did said court, in exercising its jurisdiction, acquire jurisdiction over the person of appellant and the offense charged against him?

Argument upon this point seems unnecessary, since the application itself states that the grand jury of said county found, presented, and filed in said court an indictment charging him with the offense of murder committed within the body of said county, and that he was arrested upon said charge and brought into said court and there arraigned upon the same before the court, and the jury empaneled to try the case, and was found guilty.

When the grand jury presented and filed in said District Court the indictment charging appellant with the

crime of murder committed within the body of said county, the jurisdiction of the court over the offense attached. When appellant was by the process of the court arrested and brought into court upon said indictment and the charge therein presented, the jurisdiction of the court over his person became complete, and the right of the court to proceed with the trial of the case without let or hindrance from any source was beyond question.

In this connection the court's attention is especially called to the fact that appellant, in his application, does not deny that the State of Texas had a law against murder, defining the offense and fixing a penalty therefor. On the contrary, appellant admits that at the time the offense charged against him was alleged to have been committed, as well as at the time of his trial and conviction, it was a crime against the laws of Texas to commit murder, and that the penalty therefor was death, but he seeks in this proceeding to avoid the judgment and sentence of the court upon the ground that in the trial of his case the law administered to him by the court was not the law. There was no allegation that the law administered to him was in violation of the Constitution of the United States, but simply that it was not the law, because it had not been enacted in accordance with the provisions of the State Constitution.

Admitting all that is said in the petition to be true, still the facts stated do not authorize the judgment rendered in this case to be revised by this character of proceeding in any other court, much less in this court or the Circuit Court below whose jurisdiction in such cases is limited to cases arising under the Constitution and laws of the United States.

The court having acquired jurisdiction of the person

and the offense, it was upon the trial the judge of the law applicable to the case, and the fact that the law applied in the case was not the law applicable thereto did not destroy the jurisdiction of said court; neither did it make the judgment rendered by it void. The judgment so rendered is valid and binding until revised in the mode pointed out by law, which, in the case at bar, was by appeal to the Court of Appeals of the State of Texas.

Upon this point the court in the case of Ex Parte Parks, cited above, says: "Where an inferior court has jurisdiction of a cause and person in a criminal suit and no writ of error lies from this court, it will not on habeas corpus review the legality of the proceeding."

And again in the same case it is said: "Whether the matter for which a party is indicted in the District Court is or is not a crime against the laws of the United States is a question within the jurisdiction of that court which it must decide. Its decision will not be reviewed here by writ of habeas corpus." If this be the rule between this court and inferior courts of the United States over whose judgments and jurisdiction this court in nearly all cases has and exercises the power of revision, then how much more should it be the rule as between the Federal courts and the State courts, since the power of the former to revise the judgments and proceedings of the latter is limited to those cases involving the Constitution of the United States and laws and treaties made by authority thereof.

We have seen that the District Court of Maverick County had jurisdiction of this case and of the person of appellant, and that that jurisdiction attached and was exercised; and the fact, if it be a fact, that the court committed errors in the trial of the case does not give this

court jurisdiction to revise its judgment, because irregularities and errors in the trial of a case in a State court can be corrected only in the State court, and are not subjects of revision here. The power of this court in the premises extends only to the determination of the question whether the State court had authority to proceed at all. If it did, that is the end of the matter, and this court can not inquire further. Such is the doctrine laid down in Kennard v. Louisiana, 92 U. S., 480; also Walker v. Souvinet, Id., 92.

It is only when the judgment of the court of a State depriving a person of life, liberty, or property is absolutely void for the want of jurisdiction or other cause apparent of record that the courts of the United States are authorized by writs of habeas corpus to arrest the jurisdiction of a State court and take the party from its custody. This is expressly decided in the case of Ex Parte Parks, supra. The same doctrine is also announced in the two cases of Ex Parte Royal and Ex Parte Fonda, cited above.

We have shown that the District Court of Maverick County was duly and lawfully created and organized; that it had jurisdiction to try the offense of murder. Therefore, we submit in all earnestness that the question whether the law of murder, as defined in the present Penal Code of the State of Texas and administered to appellant on the trial of his case by the State court, is the law of murder of the State of Texas, is a State and not a Federal question. The trial court by its judgment and sentence having decided that it is the law of Texas, its action in the premises is subject to revision only by the courts of Texas.

Recognizing the truth of this proposition, and in order to break its force and avoid what is said in Ex Parte

Fonda, supra, appellant assaults the high character and standing of the judges of our court of last resort, impugns their judicial fairness, and seeks to disqualify them upon the flimsy and untenable proposition that they are interested in the issue and will be sitting in their own case; for, as he alleges, the life and tenure of their offices is dependent upon the validity of this code. Those gentlemen, in assuming the duties of their positions, took a solemn and sacred oath to uphold and support the Constitution of the United States and of the State; and, without attempting to vindicate them against the aspersions and reflections cast by the appellant (for they need no vindication), it will be a sufficient answer to all that has been said upon this point by appellant and his counsel to state that the Court of Appeals of Texas is a court of last resort, the highest authority known to this State in criminal matters; that this court is the creature of the Constitution of the State of Texas, with all its powers and jurisdiction, as well as the salary and tenure of office of the judges thereof, fixed and prescribed by that instrument; and so far as their right to hold the office and to exercise the powers and jurisdiction conferred upon the court by the Constitution is concerned, it is a matter of no consequence whether Texas has a Penal Code or not. You may wipe out, destroy, and obliterate every statute of the State in existence, or that has been enacted since it was a State, and the Court of Appeals remains intact, a constitutional tribunal with full power and authority to adjudicate and determine all criminal cases brought before it. Const. of Texas, art. 5, secs. 5 and 6.

In the case of Spies v. Illinois, 23 U. S., 181, it is said: "If the right was not set up or claimed in the proper court below, the judgment of the highest court

of the State is conclusive so far as the right of review here is concerned."

As shown by the record, appellant's case is now pending on appeal in the Court of Appeals of Texas, and it does not appear from the record in this case that the matters and things here complained of were presented to the State court for adjudication; if they were, then upon authority of Ex Parte Fonda, the State court should be given full opportunity to pass upon them, and his remedy (if any) is by error and not by habeas corpus, which, to say the least, is but a collateral attack upon the judgment of a court of competent jurisdiction. If they were not presented, then upon the authority of Spies v. Illinois, we submit that the action of the State court in the premises is conclusive and final.

This brings us to the consideration of our second proposition.

APPELLEE'S SECOND COUNTER-PROPOSITION.

The question whether an act of the Legislature of a State has been duly passed in accordance with the requirements of the Constitution of such State, is a State and not a Federal question, and the decision of its highest court thereon is conclusive.

Statement.

See statement under First Proposition.

Authorities.

Texas Constitution, art. 5, secs. 5 and 6.
Usener v. The State, 8 Texas Court Appeals, 177.
Baldwin v. Kansas, 129 U. S., 57.
Walker v. Souvinet, 92 U. S., 92.

Townsend v. Todd, 91 U. S., 452.
South Ottawa v. Perkins, 94 U. S., 260.
Leavenworth v. Barnes, 94 U. S., 70.
Railroad Co. v. Georgia, 98 U. S., 365.
Gut v. The State, 9 Wall., 37.
Norton v Shelby Co 118.

Remarks.

This is in effect a suit between appellant and the State of Texas. The issue is the sovereign right of the State to make laws, to have them ascertained, construed, and enforced by its own courts, and to punish those who offend against them.

With that same thirst for gore and murderous intent with which appellant slaughtered those helpless and defenseless women he now assaults the sovereignty of the State, and with mind bent upon destruction, he invokes the power of this court to aid him in the unholy task of annihilation. He defies the supremacy of State laws and spurns the jurisdiction and authority of State courts. He challenges the right of the State to punish him for an offense committed against its laws, after a conviction upon a fair trial under the law and in accordance with the law, which is due process of law. He does not complain that the law under which he was tried and convicted contravenes any provision of the Federal Constitution. He sets forth no provision of that instrument which in any way attempts to regulate the mode of proceeding in State Legislatures, and no clause which points out the way in which they shall enact laws. Upon all these points so vital and indispensable to the power and jurisdiction of this and the Circuit Court below to revise the judgment of the State court, his application is as silent as the tomb. Notwithstanding the code of which he complains has prevailed in the State for nearly twelve

years, recognized and observed by its people and its Legislature, and upheld and enforced by its courts from the lowest to the highest as the law of the land, he says it is not the law, and asks this court, therefore, to relieve him from the judgment and sentence pronounced against him under it.

Fully twenty volumes of the Texas Court of Appeals Reports have been published by authority of law since the adoption of this code, and there is not a case reported in them in which this code is not construed, upheld, and enforced.

In one case, that of Usener v. The State, the question of the validity of the present code was brought directly before the court. It was the only question presented and decided in the case. The appeal was taken upon that ground, and the court, after full consideration of the question, unanimously upheld and sustained the validity of the code and the regularity of its adoption.

In discussing the case, it laid down this doctrine: "Courts, in passing upon the constitutionality of a law passed by both branches of the Legislature, properly signed by the presiding officer of each, approved by the Governor, and promulgated as the law of the land in compliance with all other constitutional requirements, are not required to go behind the enrolled bill deposited as a record in the office of the Secretary of State, and consult the journals of the Legislature with reference to the antecedent proceedings in the enactment of the law, in order to determine whether or not it was passed in conformity with section 32 of article 3 of the Constitution of 1876."

The opinion, after concluding that the code, as a matter of law, was duly and constitutionally enacted, then proceeded to determine the same as a matter of fact. It

says: "We will state, however, for the information and satisfaction of learned counsel, that without feeling in duty bound to do so in the adjudication of this case, we yet have, nevertheless, as matter of curiosity and for our own personal gratification, examined the journals of the two houses, both with regard to the original bill, entitled 'An act to adopt and establish a Penal Code and a Code of Criminal Procedure for the State of Texas,' and the amendment to article 186, 'the Sunday law,' specially attacked in this case, and the result of our examination is that the two acts have received the legislative sanction in strict conformity with the constitutional requirements, and if driven to the journals for authority to declare these acts constitutional, we do not hesitate to say we are of opinion we would find no difficulty in the way of establishing the fact by them in every essential particular."

Here we have the question of the validity of the code decided by the highest court of the State in criminal matters, and the conclusion reached that as a matter of fact, as well as of law, the code had been duly and constitutionally adopted. This, it seems, should be sufficient to finally and forever end the question. The doctrine announced in this case has been the rule of construction in this State from the beginning. The same doctrine was announced in the cases of Railroad v. Hearne, 32 Texas, 547. The able argument in this case, upon this point, by Messrs. Gray & Botts. for plaintiff in error, is specially commended to the court for its sound reasoning and convincing logic. See also Blessing v. Galveston, 42 Texas, 641; Day Company v. The State, 68 Texas, 526; and Ex Parte Tipton, 28 Texas Ct. App., 438.

In this last case, which is the last expression of the

Court of Appeals of Texas upon the subject, the case of Usener v. The State was reviewed approvingly and the doctrine there announced reaffirmed.

In the case of South Ottawa v. Perkins this court said: "Except where the Federal Constitution and laws are concerned, the courts of the United States in passing upon the Constitution and statutes of a State conform to the settled construction of them by the highest court of the State, and when the latter holds a pretended act of the Legislature to be void and not a law, the courts of the United States are bound to hold accordingly."

In Walker v. Souvinet this court held that all questions arising under the Constitution of a State alone are to be settled by the decisions of the State court.

In Baldwin v. Kansas the plaintiff in error complained of the judgment of the court of last resort of the State of Kansas, as well as the trial court, upon the ground, among others, that he had not been tried according to the provisions of the Constitution of Kansas, and he appealed to this court to set aside the judgment against him. This court dismissed the writ of error for want of jurisdiction, and in concluding its opinion, said: "The question whether the evidence in the case was sufficient to justify the verdict of the jury, and the question whether the Constitution of the State of Kansas was complied with in the proceedings of the trial, which are challenged, are not Federal questions which this court can review."

The case of Gut v. The State was a writ of error to the Supreme Court of Minnesota from this court. Plaintiff in error complained that under the Constitution of the State of Minnesota he was entitled to be tried in the district in which the offense was alleged to have

been committed. He complained that he was not tried in such district, and that the judgment of conviction against him had been affirmed by the highest court of the State, and he asked this court to set aside that judgment and revise the same, because he had not been secured a trial in accordance with the provisions of the Constitution of the State of Minnesota. This court in disposing of the case said: "The ruling of the State court is conclusive upon this court upon the point that the law in question had not violated the constitutional provisions cited." Continuing the court said: "Undoubtedly the provision granting to the accused a public trial within the county or district in which the offense is committed is of the highest importance. It prevents the possibility of sending him for trial to a remote district, at a distance from friends, among strangers, and perhaps parties animated by prejudices of a personal or a partisan character; but its enforcement in cases arising under State laws is not a matter within the jurisdiction of the Federal court."

The case of Railroad Co. v. Georgia was a writ of error to the Supreme Court of Georgia from this court. It appears that the railroad company was resisting the validity of a State statute imposing a tax upon it upon the ground that the statute impaired the obligation of a contract, and was therefore violative of the Federal Constitution. The State replied that at the time the charter of the railroad was granted it was a part of the general law of the State, which entered into and became a part of the charter, that all charters granted by the State should be subject to the right of the State to withdraw the franchises, or change, modify, or destroy such charter or franchise at its will unless such right was expressly negatived in the charter. To avoid the force of

this law the railroad company replied that the same had never been duly enacted by the Legislature, and was not at the time of granting their charter the law of the State, in this, that the code of which it was a part had not been read three times in each house of the General Assembly as required by the State Constitution. The State court of last resort upheld this statute. This court, in disposing of the case, said: "In regard to the position taken by the plaintiff in error that the sections of the act we have quoted were not laws of the State in 1863, because the act was not read three times in each house of the General Assembly as required by the State Constitution, it is sufficient to say that the Supreme Court has decided that they were, and its decision of such question is not open for revision by us in a case brought here from a State court."

In re Hoover, 30 Fed. Reporter, 51, it is said: "Where the writ of habeas corpus from the United States court is sought against the sheriff of a State court by one imprisoned for the violation of a State law, the petitioner must clearly show an irreconcilable antagonism between the Federal law and the State law under which he is in custody."

From the foregoing authorities three propositions are clearly deducible: First. That it is unquestionably the province of State courts of last resort to determine and ascertain what are the laws of the State, and to settle all questions concerning them arising under the State Constitution, and that their decisions in the premises are final and conclusive. Second. That it is the province of the Federal courts, when such laws have been ascertained by the State courts, to determine whether these laws so ascertained violate any of the provisions of the Constitution of the United States; and their judgments in the

premises upon such questions are final and conclusive. Third. That to authorize this court to revise a judgment or decision of a State court upon a State statute and to release a party from the custody of State authority, the party seeking the release must show by his application that the law under which he is held contravenes some provision of the Federal Constitution.

In the light of these principles, and testing the merits of appellant's case by them, let us examine the record and see if there is anything set forth which brings it within the rules here stated.

As heretofore said appellant's application for writ of habeas corpus in no particular complains that the law under which he was tried and convicted contravenes any provision of the Federal Constitution. Neither does it contain any statement or allegation that in the mode and manner of its enactment and adoption any provision of the Constitution was infringed. He cites no clause of the Federal Constitution, nor indeed could he cite any, which in the most remote degree points out the method by which State Legislatures shall conduct their proceedings and formulate, adopt, and promulgate their enactments. His whole case in a nut shell is that the law under which he was tried was not enacted agreeably to the rules and requirements of the Constitution of the State of Texas. This, as we have already stated, and on which we now insist, is a State and not a Federal question.

Upon the proposition that it is the province of the State courts to construe and ascertain what are the State laws, and when construed are binding, and upon the proposition that it is the province of the Federal courts, when these laws have been so construed and ascertained, to determine whether they are in conflict with

the Federal Constitution, the recent Minnesota railway cases, reported in 134 U. S., 418–481, are strongly in point, and demonstrate in the highest degree the truth of the doctrine here contended for. There was a statute of a State which, according to the decision of the Supreme Court of the United States, was not per se violative of the Federal Constitution, but under the construction placed upon it by the Supreme Court of Minnesota, which this court said was binding upon them, the statute was made to contravene the Federal Constitution.

If it had not been the province of the State court to construe and ascertain the State law in a manner binding upon all other courts, this court would have surely sustained this statute, which was not of itself unconstitutional, and instead of holding it so would have said to the Supreme Court of Minnesota, "Your construction of the statute is wrong, and therefore your decision is reversed and the statute is upheld." But such was not the result. This court accepted, as indeed it should have done, the construction placed upon the statute by the Supreme Court of Minnesota as being final and binding, and as that construction rendered the law repugnant to the Constitution of the United States, this court accordingly held it to be.

The highest court of this State having jurisdiction of such matters having solemnly and finally declared this code to be the law of Texas, duly enacted by its Legislature agreeably to its Constitution, will this court now reopen the question and institute an inquiry as to the correctness of this finding? Will it open wide the doors of the State penitentiary and turn loose upon the country a horde of criminals, to corrupt public morals, to disturb the public peace, and to vex, harrass, and

outrage society? Will the court do this? If so, by what authority? Not by the Federal Constitution, for under it the judicial powers of this court in the premises extend only to cases arising under that instrument and the laws and treaties made by its authority, of which the case at bar is not one. Neither by its former decisions, for as has already been shown, they all hold to the contrary. Then we repeat, by what authority? Not by usurpation, we feel assured, for this is destructive of all government, all law, and all right.

The other questions presented in the record regarding the organization and selection of the grand and petit juries and the sufficiency of the indictment may be disposed of briefly by the statement:

1st. That neither the right of trial by jury nor the right to be prosecuted upon an indictment in a State court are rights guaranteed by the Constitution of the United States. Walker v. Souvinet, 92 U. S., 92; Kennard v. Louisiana, Id., 480; Hurtado v. California, 110 U. S., 516; Spies v. Illinois, 123 U. S., 131; Brooks v. Missouri, 124 U. S., 394; Baldwin v. Kansas, 129 U. S., 56.

2nd. That both the grand and petit juries are creatures of the Constitution of the State which, by section 13, article 5, provides, among other things, that the grand and petit juries of the District Courts shall be composed of twelve men each.

The power of the grand jury to find and present indictments is also of constitutional authority, and the same instrument vests in the Supreme Court of the State the power to prescribe the rules of practice and procedure for the government of all its courts in the trial of cases. These powers and the exercise of them being of constitutional authority, are not impugned by

appellant's application, since he rests his case alone upon the Constitution of Texas.

The question of due process of law has been discussed only incidentally, for the reason that in the view we take of the case it cannot arise in any event, for whether the act under which appellant was tried be valid or not, yet all the allegations and statements in his application for the writ show that he has received due process of law as this term is understood and construed by the courts. While he contravenes the validity of the present Penal Code, he admits that the old code, which would be in force if the new one be invalid, fixes the penalty of murder at death, which was the penalty he received upon the trial of his case, the only difference in the acts being that the present code under which he alleges he was tried ameliorates the punishment by giving him the benefit, or rather the opportunity, to receive a life term in the penitentiary, whereas under the old code it was death or nothing.

From this it results that having been indicted by a duly organized and competent grand jury, and having been tried in and before a court of competent jurisdiction by a jury of lawful men, in accordance with the recognized law and the established rules of practice and procedure of the State, he has been accorded due process of law in the highest and truest sense of the words. For whether the penalty administered to him was by the court and jury taken from the old or new code, it does not affect the question of due process of law, for due process of law is that law which hears before it condemns, which proceeds upon inquiry in a court of competent jurisdiction, and which renders judgment only after trial. 110 U. S., 535.

To sum up in a nut shell: Having a valid Constitu-

tion and a court of competent jurisdiction, duly organized and created, deriving its powers and jurisdiction from that Constitution, with its rules of procedure and practice fixed by its authority—in short, having all the machinery necessary to administer the law, and established rules of procedure and practice by which it shall be administered, the case stands stripped of every question except the one, Was there any law for this machinery to administer? This we submit is a question which must be addressed to and determined by the machinery seeking to administer the law; and whether its conclusion as to whether there be a law to administer be correct or erroneous, it does not affect the question of due process of law, for the very act of determining this question is due process of law within the meaning of the Federal Constitution.

If this position be incorrect and the contention of the appellant be sustained, then every act of the Legislature of the State, whether contravening the Federal Constitution or not, is subject to review by the Federal courts to determine, not whether it violates the Federal Constitution, but whether it accords with ~~this~~ the Constitution of the State, and for this purpose on the ground ~~only~~ alone the court will take jurisdiction. Such we submit was never the scope, purpose, or intent of the fourteenth amendment.

In concluding these remarks we beg to commend to the court the following extract taken from an opinion delivered by the late Justice Miller in the case of Davidson v. New Orleans, 96 U. S., 103. Speaking upon this subject he says: "It is not a little remarkable that while this provision has been in the Constitution of the United States as a restraint upon the authority of the Federal government for nearly a century, and while